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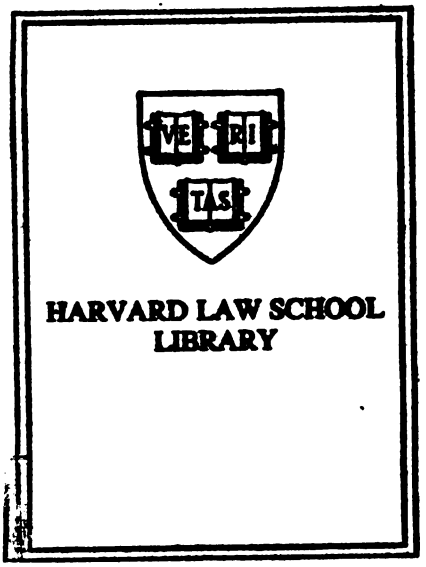

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MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

NOVEMBER 15, TO DECEMBER 28, 1889.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 78.

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1890.

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REPORTER'S NOTE.

The opinions of the October term, 1889, proved more voluminous than was anticipated, and nineteen cases had to be carried over into volume 79, which is now being bound.

This will account for the citation of the case of *Blank v. Livonia,* as in 78 Mich., on page 486 of that volume, when the case is found on page 1 of 79 Mich., in which latter volume will be found a directory giving the terms of court in the several counties for 1891.

REPORTER.

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STATE JUDICIAL DIRECTORY

For 1890.

SUPREME COURT.*

JOHN W. CHAMPLIN (CHIEF JUSTICE), . . **GRAND RAPIDS.**
[TERM EXPIRES DECEMBER 31, 1891.]

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CHARLES D. LONG, . . .	FLINT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

COURT OFFICERS:

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MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
††BENJAMIN W. HUSTON,	ATTORNEY GENERAL, . .	VASSAR.

*For composition of Court during period covered by Vol. 78, see Vol. 68, page iii.

†Appointed to fill vacancy caused by the death of Mr. Justice CAMPBELL.

††Appointed to fill vacancy caused by the resignation of S. V. R. Trowbridge.

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7.	WILLIAM NEWTON,	FLINT.
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15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, MARSDEN C. BURCH,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
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25.	JOHN W. STONE,	HOUGHTON.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT. . . . . F. H. CHAMBERS.

(Jan. 1, Mar. 5, May 7, July 2, Sep. 8, Nov. 5, 1890.)

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

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OCTOBER TERM, 1889.*

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THE HANEY MANUFACTURING COMPANY (A CORPORATION) v. GAIUS W. PERKINS ET AL.

Libel and slander—Publication—General and special damages—Partnership—Liability of firm for slanderous words of member—Evidence.[1]

1. A partnership is liable for slanderous statements made by one partner, the purpose of which is to aid the partnership business by preventing another party from making sales of an article which the partnership is at the time selling.
2. Words spoken or written injurious to a person in his business, and false and malicious, are actionable *per se*, and special damages need not be proved.
3. The fact that a plaintiff, in a slander suit, calls the defendant as a witness, who denies any knowledge of the alleged slanderous statements or of their publication, will not, of itself, prevent the plaintiff from proving his case by other witnesses or circumstances, nor will the jury be debarred from drawing the natural and necessary inferences, from facts proven by such other testimony and circumstances, outweighing the positive statements of the defendant.
4. In this case it is held that the facts shown, and offered to be shown, by the plaintiff, raised issues which should have gone to the jury, and that under the evidence given and offered, which upon this record must be taken as true, the plaintiff was entitled to have the alleged libelous article placed before the jury; and that, under proper instructions, it was a question of fact for their consideration whether its publication was within defendants' knowledge, or whether they were responsible for it.

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* Continued from Vol. 77.

[1] For full digest of points decided, see *Table of Cases Reported.*

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Error to Kent. (Grove, J.) Argued October 8, 1889. Decided November 15, 1889.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Taggart & Denison, for appellant, contended:

1. Payment to a newspaper, as for an advertisement, is evidence of the adoption of a libel; citing *Schenck v. Schenck*, 20 N. J. Law, 211; and proof of publication was held sufficient on no stronger circumstances in *Bent v. Mink*, 46 Iowa, 577–579.
2. Mere silence may be a ratification even if the act was done by a stranger; citing *Railroad Co. v. Cowell*, 28 Penn. St. 329; *Ladd v. Hildebrant*, 27 Wis. 135; *Mining Co. v. Bank*, 2 Col. 262, 263.
3. As to liability of a principal for libelous statement of agent, counsel cited *Express Co. v. Fitzner*, 59 Miss. 584; *Woodling v. Knickerbocker*, 31 Minn. 268.
4. Letter press copies of letters, written to parties outside the State, are competent to be introduced as evidence; citing *Vinal v. Gilman*, 21 W. Va. 313; *Elwell v. Mersick*, 50 Conn. 276; *Beattie v. Hilliard*, 55 N. H. 435; *Schaefer v. Georgia Railroad*, 66 Ga. 44.
5. As to the liability of a partnership for the slanderous words of one member, who is acting manager of the concern, counsel cited *Patten v. Gurney*, 17 Mass. 182; *Lothrop v. Adams*, 133 d. 481; *Glass Co. v. Paulk*, 83 Ala. 404.

Taggart, Wolcott & Ganson, for defendants, contended:

1. In an action for damages caused by alleged libelous statements as to one's business, only special damages can be recovered, that being the gist of the action; citing 2 Add. Torts, § 1143; *Pollard v. Lyon*, 1 Otto, 225; *Swan v. Tappan*, 5 Cush. 104; *Tobias v. Harland*, 4 Wend. 537; *Dooling v. Pub. Co.*, 144 Mass. 258.
2. A joint action for slander cannot be maintained; citing Townsh. Lib. & Sland. § 118; *Webb v. Cecil*, 9 B. Mon. 198; *Thomas v. Rumsey*, 6 Johns. 29–31; 1 Chit. Pl. 85; 2 Add. Torts, § 1140; Starkie, Sland. 448 (*334).

LONG, J. This action was brought by the plaintiff, a manufacturing corporation, to recover damages alleged to

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have been caused by reason of the publication, oral, written, and printed, of the statement that the defendants had brought suit in the United States court against the plaintiff for an infringement of a patent, and had secured an injunction against it, and closed it up, which statements were claimed to be false and malicious.

The plaintiff is a manufacturing corporation, located at Grand Rapids, and engaged in making school-seats. The defendants are partners, under the name of the "Grand Rapids School Furniture Company," making substantially the same seats, and the two are competitors for the same trade throughout the country. Prior to July 9, 1886, defendants bought up an old patent on school seats known as the "Slaymaker Patent," and on that day defendant Perkins, claiming to own the same, filed a bill in the United States circuit court at Grand Rapids against the plaintiff, alleging that the seat made by the Haney Company infringed the Slaymaker patent. No injunction was asked or granted, and afterwards, on final hearing on the merits, the bill was dismissed.

The declaration by which the present action was commenced contains six counts. The first count charges that the defendants published the matter complained of in the newspapers of Grand Rapids, and caused such papers to be circulated generally among persons likely to purchase plaintiff's goods; and that they also published the same statements, in substance, by letters written by said defendants, and by them sent out by mail broadcast throughout the country, to any and every person whose name they could learn who was negotiating with plaintiff for the purchase of its goods.

The second count charges that the defendants made such statements in person and by their agents at their office in Grand Rapids, and by their agents throughout the country, to and in hearing of divers persons intend-

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ing to purchase school seats of the plaintiff, and to the public generally.

The third count charges that the defendants caused such statements to be published in the Grand Rapids Telegram-Herald, a newspaper published at Grand Rapids, and circulating throughout the State of Michigan and elsewhere.

The fourth count charges that the defendants made such statements in a letter addressed to one Elliott, and sent him at Council Grove, Kansas.

The fifth count charges that the defendants made such statements orally to a Mr. DeMoss and a Mr. Conrad, of Clinton county, Michigan.

The sixth count charges that the defendants made such statements to the school board of the village of Grand Ledge.

At the close of the trial in the circuit court, the court directed the jury to return a verdict in favor of the defendants, on the ground that the testimony offered by the plaintiff did not entitle it to recover.

It is insisted here by the counsel for the defendants that the testimony offered and that produced on the trial by the plaintiff, if true, would not constitute any ground of recovery; or, in other words, that there was nothing to go to the jury, and that the court was not in error in directing the verdict. Under the third count of the declaration, plaintiff produced a Telegram-Herald newspaper of July 15, 1886, containing an article stating that there was a lively competition between the Grand Rapids School Furniture Company and the Haney Manufacturing Company, and, among other statements, that the former company had secured an injunction against the Haney Manufacturing Company, restraining it from manufacturing seats with patent bracket and fold, etc. This article was offered in evidence by plaintiff, and ruled out by the

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court. Before the offer was finally made the plaintiff claims to have shown, or offered to show, certain other facts which tended to prove the responsibility of the defendants in this publication. From the evidence given and offered on this subject it is claimed that it appeared or was offered to be shown:

"1. That the article on its face was an advertisement for the benefit of the defendants.

"2. That it could not have been made up from the court records, for its statement as to the injunction was not suggested by the record.

"3. That it contained a statement (that the Grand Rapids Company had sent a representative to Louisville and Cincinnati, and purchased an old patent) which was within the private knowledge of defendants, and must have been furnished by them.

"4. That it was not written by a reporter, in the usual way, nor by any one connected with the paper.

"5. That Mr. Sproat, the newspaper man, found the manuscript of the article on his desk, in a strange handwriting, having come in through the business office of the publishing company.

"6. That the last paragraph of this manuscript was of such a nature (most naturally so extreme against the Haney Company) that the manager thought it was not prudent to publish it in that form, and such last paragraph was accordingly cut out.

"7. That defendants' account-books showed a payment July 29 to the Telegram-Herald of $8.55 for advertising, the entry being 'Adv. Com. Rec.,' which Mr. Peregrine says means, 'Advertising Commercial Record,' but none of the defendants have any idea what this payment was for, unless for advertising for men or for job-printing.

"8. That during that year the Telegram-Herald did no job-printing nor any work except publishing a newspaper, and that defendants had no advertisement in the Telegram-Herald on July 29, or for 90 days before, unless it was this article.

"9. That exactly the same false statement as to the injunction contained in the article was repeated by defendants in a letter by Mr. Peregrine personally, and was current in defendants' office among their employés."

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The court was of the opinion that these matters, taken together, had no tendency to show that the defendants were responsible for the publication. It appears that the plaintiff called the defendants as witnesses, and they denied all knowledge of the publication, or that they were in any manner responsible for it. We think, however, that the facts shown, and offered to be shown, raised issues which should have gone to the jury; that under the evidence given and offered, which upon this record must be taken as true, the plaintiff was entitled to have the article placed before the jury; and, under proper instructions, it was a question of fact for their consideration whether the publication was with their knowledge, or whether they were responsible for it. These were not the only circumstances shown, or offered to be shown, tending to connect the defendants with the publication or the circulation of the facts stated therein.

Under the fourth count of the declaration plaintiff gave evidence tending to show that one C. B. Elliott had been selling seats for plaintiff in Kansas, Colorado, and Nebraska; that on March 2, 1887, Elliott received a letter purporting to come from defendants, stating, among other things, that defendants had served an injunction against Haney & Co., and about closed up its factory; that in consequence of this letter Elliott ceased to take orders for plaintiff, and turned orders taken over to other parties. Defendants deny writing this letter, or that the correspondence clerk by whom the letter was claimed to have been written had any authority from defendants to write it. Defendants contend that Mr. Reed, the correspondence clerk, was acting outside his authority in writing it, so that the defendants could not be held liable for his acts. This letter was written in the name of the defendants, by one who had charge of the corres-

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pondence, and received and answered letters without instructions from his principals.

In connection with this letter and the other circumstances, it was shown, under the fifth count, that two men, DeMoss and Conrad, school officers of their respective districts in Clinton county, in August, 1886, went to Grand Rapids to buy school seats, and, going into defendants' office, they were there told that Haney & Co. were closed up, and could not fill orders, and that if they purchased from Haney & Co. they would do so at their own risk, and the witness DeMoss says that something was then said about an injunction. The witness thought it was defendant Peregrine who made the statement, and in the court-room pointed out the man who he thought made it, but pointed out the defendant Perkins instead of Peregrine. Defendants deny making the statement, and claim that, if any such statement was made, it must have been by Mr. McCormick, an employé, who then had charge of the business.

These are some of the circumstances shown, and offered to be shown, by the plaintiff, tending, as counsel claim, to connect the defendants with the publication of the article in the Telegram-Herald, the writing of the letter to Elliott, and the oral statement made of plaintiff's business, and from which it has sustained damage and loss. The court below was of the opinion that there was nothing to go to the jury connecting the defendants with these representations. We do not agree with the learned circuit judge. Certain facts are testified to, with more or less degree of certainty, by the witnesses DeMoss and Conrad. Whether true or not were questions of fact. If these witnesses were to be believed, the defendants, or some of them, were making statements the natural tendency of which would be to injure the plaintiff in its business, and of like character to those con-

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tained in the Telegram-Herald, and in the letter to Elliott.

From this record certain facts must be conceded to be established: That an article was published in the Telegram-Herald; that Mr. Sproat, the manager of the newspaper in which the article was published, found the manuscript of the article on his desk in a strange handwriting, having come through the business office of the publishing company; that defendants' account-books showed a payment July 29, to the Telegram-Herald, of $8.55 for advertising, and the nature of which defendants are unable to explain; that the same statements contained in the article in the Telegram-Herald are subsequently reiterated in the letter to Elliott, the letter being written by the correspondence clerk of the defendants, who had charge of this department; and that statements of similar character were also made by one of the defendants, either Perkins or Peregrine, to the witnesses DeMoss and Conrad, subsequent to the time the Elliott letter was written. Certain facts being proven, the natural inferences to be drawn from these facts were for the jury, and the court was in error in holding that there was nothing to go to the jury.

The fact that plaintiff called the defendants as witnesses, and they testified that they knew nothing of the article in the Telegram-Herald and the letter to Elliott, and that they made no such statements as claimed by DeMoss and Conrad, would not, of itself, prevent the plaintiff from proving his case by other witnesses or circumstances. Neither would the jury be debarred by these facts from drawing the natural and necessary inferences from facts proven by other testimony and circumstances, outweighing the positive statements of the defendants.

Some contention is made that the defendants could not be made jointly liable for these slanders upon the busi-

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ness of the plaintiff, even if one or two of the partners may have been found guilty. The defendants were partners in business, and each of the partners is an agent of the partnership as an entirety, and, if in the course of that business he injures the business of another by slander, the partnership is liable therefor, just as it might be for any other tort by any other agent. *Patten v. Gurney*, 17 Mass. 182; *Lothrop v. Adams*, 133 Id. 481; *Glass Co. v. Paulk*, 83 Ala. 404 (3 South. Rep. 800). In the present case it is claimed that the very purpose of these statements was to aid the business of the defendants as a partnership, by preventing plaintiff from making sales of an article which the defendants were themselves as a partnership selling. If this fact is proven, then, in the course of the partnership business, if any one of the partners made false representations as to the business of another, and for the purpose of aiding the business of his own firm, the partnership must be held responsible for it.

It is also urged by defendants that, this being an action of slander of title, general damages were not recoverable, and that no special damages were proved. Elliott refused to turn his orders over to plaintiff after receiving the letter of March 2, 1887, and De Moss and Conrad purchased seats of defendants which otherwise they might have purchased of plaintiff. This was some proof of special damages. It is not, however, strictly an action for slander of title. If the statements claimed to have been made by defendants were true, that the plaintiff was under injunction from the United States court not to sell seats, then any sale made would have been a violation of the injunction, and a contempt of the court, for which plaintiff could have been proceeded against personally; and the declaration alleges that these statements were made of and concerning the plaintiff, and to

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injure the plaintiff in its business. Words spoken or written injurious to a person in his business, and false and malicious, are actionable *per se*, and special damages need not be proved. The declaration alleges both general and special damages, and some testimony was given on the trial tending to prove both.

Under the facts proven and offered to be shown, the court was in error in refusing to admit in evidence the article published in the Telegram-Herald. The letter should also have been received.

For the errors pointed out the judgment of the court below must be reversed, with costs, and a new trial ordered.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. MORSE, J., did not sit.

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JOHN RANKIN v. SIGMUND ROTHSCHILD AND FEIST ROTHSCHILD.

[See 66 Mich. 663.]

Judgment creditor's bill—Execution—Return of officer—Jurisdiction—Joint debtors—Equity practice—Appointment of receiver—Appeal.

1. An answer to a judgment creditor's bill, used in opposition to a motion for the appointment of a receiver before the time for replying has expired, can only be treated as an affidavit.
2. It is proper to permit affidavits to be read on the hearing of a motion for a receiver in a judgment creditor's suit, to meet matters set up in avoidance in defendant's answer.
3. A general assertion in an answer to a judgment creditor's bill that the defendant has property liable to execution, and which

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might have been levied upon, is insufficient. He must state what and where the property was that the sheriff ought to, but did not, seize.

4. On the hearing of a motion for a receiver in a judgment creditor's suit upon bill and answer, before the time for replying has expired, the return by the sheriff of the execution unsatisfied is conclusive upon the defendant.

5. Under How. Stat. § 6612, the circuit court of the county in which the assignee of a judgment resides has jurisdiction of a creditor's bill to enforce said judgment.

6. It is not necessary for the assignee of a judgment to cause an execution to be issued and returned *nulla bona*, after becoming such assignee, before he can file a creditor's bill, where an execution has been so issued and returned prior to such assignment. *Gleason v. Gage*, 7 Paige, 121.

7. One of two judgment debtors against whom an execution has been returned unsatisfied as shown by a creditor's bill filed against the remaining debtor, who asserts in his answer that his co-debtor is insolvent, is not a necessary party to said suit; there being no dispute over the amount due to the complainant. *Williams v. Hubbard*, 1 Mich. 446.

8. In this case it is held that the judge had jurisdiction to appoint a receiver; that he exercised his discretion properly; that the record affords no excuse for appealing; and that, under the circumstances, the order was not appealable.

Appeal from Mecosta. (Palmer, J.) Argued October 9, 1889. Decided November 15, 1889.

Judgment creditor's bill. Defendant Sigmund Rothschild appeals from order appointing receiver, etc. Appeal dismissed and record remanded for further proceedings. The facts are stated in the opinion.

D. P. Foote, for complainant, contended:

1. As to the conclusiveness of the officer's return, counsel cited *Jones v. Green*, 1 Wall. 332.

2. The case as presented establishes the following points beyond controversy:

a—A judgment in favor of complainant's assignor, and its assignment to complainant.

b—An execution issued upon such judgment, directed and delivered to the proper officer.

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c—The return of the officer that he has been unable to find property to satisfy the execution, and—

d—The allegation of the complainant that he has reason to believe, and does believe, that defendant Rothschild has property beyond the reach of execution.

If these points are established to the satisfaction of the court, the complainant is entitled to a receiver, and the relief prayed, as a matter of course; citing How. Stat. § 6614; *Osborn v. Heyer*, 2 Paige, 342; *Bloodgood v. Clark*, 4 Id. 574, 577; *Cuyler v. Ensworth*, 6 Id. 32, 35; *Fitzburgh v. Everingham*, Id. 29, 30; 1 Barb. Ch. Pr. 659; *Clark v. Davis*, Har. Ch. 227, 234; *Stewart v. Stevens*, Id. 169; *Eldred v. Camp*, Id. 162; *Thayer v. Swift*, Id. 430; *Smith v. Thompson*, Walk. Ch. 1.

3. If Ortmann is irresponsible, and it must be conclusively presumed that he is from the officer's return and defendant's answer, he is not a necessary, nor even a proper, party; citing *Van Cleef v. Sickles*, 5 Paige, 505; *Williams v. Hubbard*, 1 Mich. 446; *Hadden v. Spader*, 20 Johns. 554.

4. How. Stat. § 6614, providing that when an execution has been returned unsatisfied the party suing it out may file a bill in chancery, etc., must be read in connection with Act No. 75, Laws of 1863 (How. Stat. § 7344), which gives the assignee of choses in action the right to maintain an action thereon in his own name. The sale and assignment to complainant of the judgment carried with it the right of the assignor to maintain this suit, growing out of the return of an execution *nulla bona;* citing *Cook v. Bell*, 18 Mich. 387, 393; *Hadden v. Spader*, 20 Johns. 554; *Gleason v. Gage*, 7 Paige, 121.

DeForest Paine, of counsel for complainant, contended:

1. The right to file the bill was not waived or lost by the issue of *alias* executions; citing *Clark v. Davis*, Har. Ch. 227, 234, 235; *Cuyler v. Moreland*, 6 Paige, 275, 276.

2. Jerome was not a necessary party; citing *Morey v. Forsyth*, Walk. Ch. 465; nor was Ortmann, if without property and irresponsible; citing *Williams v. Hubbard*, 1 Mich. 446.

3. The officer's return is in proper form against both of the defendants in the execution; citing *Williams v. Hubbard*, 1 Mich. 446; and there being no collusion, and the return not being made by Jerome's direction, it is conclusive against Rothschild; citing *Bank v. Dorr*, Walk. Ch. 323, 324.

Griffin, Warner, Hunt & Berry, for defendant, contended:

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1. There is nothing in the authorities cited (1 Barb. Ch. Pr. 668; High, Receivers, § 85; *Ladd v. Harvey*, 21 N. H. 514, 520; *Goodman v. Whitcomb*, 1 Jac. & W. 569), supporting the position that affidavits of which defendant has had no notice can be read, contradicting the answer, at the time of the application for the appointment of a receiver.
2. A receiver on a judgment creditor's bill is not a matter of course, except the equity of the complainant is not denied by the answer, and the cases cited by complainant's counsel support this distinction; citing *Bloodgood v. Clark*, 4 Paige, 577; *Cuyler v. Ensworth*, 6 Id. 35.
3. In view of the defendant's answer, the return of the first executions unsatisfied forms no basis for a judgment creditors' bill. If the return had been so made at the express direction of plaintiff's attoneys, there would be no conflict of authority; citing *Wharton v. Fitch*, Walk. Ch. 143; *Bank v. Dorr*, Id. 317.

CHAMPLIN, J. This is an appeal from the order of the circuit court of the county of Mecosta, sitting in chancery, appointing a receiver of the assets, equitable interests, and things in action of the defendant Sigmund Rothschild, upon a creditor's bill filed by complainant, who is the assignee of Timothy Jerome and James Jerome, who recovered a judgment in the circuit court for the county of Saginaw against said Sigmund Rothschild and one Charles L. Ortmann. The bill contains the usual statements of the rendition of a judgment against Rothschild and Ortmann jointly; the issue and return of execution wholly unsatisfied as to both defendants; the issue and return of a second execution wholly unsatisfied, before the bill was filed; the assignment of the judgment of the first execution, while the second execution was outstanding.

The bill was sworn to November 9, 1888, and, at the time of serving the subpœna to appear and answer upon Sigmund Rothschild, a notice of an application to the court on December 4, 1888, for the appointment of a

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receiver, was served upon him, upon the matter of the bill.

Sigmund Rothschild filed a separate answer, which was verified on September 3, 1888, in which he admitted the rendering of the joint judgment, and the issue and return of the execution *nulla bona*. He set up in his answer, by way of avoidance, that while the first execution was in the hands of the sheriff for collection he went to Saginaw, where the plaintiffs resided, and proposed to pay to one of said plaintiffs his half of said judgment, and thereby relieve himself from any further liability thereon, but was informed by Jerome that he had given said Ortmann an extension of four months to pay his share of the judgment, but had taken no note or any security for the same. That thereupon said Rothschild requested and said Jerome promised not to in any way jeopardize or endanger the position of defendant by waiting four months, and that he told Jerome that he could and would point out property of Ortmann where and how the share which Ortmann ought to pay could be immediately and promptly collected, and, if insisted upon, he should pay the entire amount of the judgment; that he could then secure himself against such payment, by reason of his knowledge of Ortmann's property, which could then be reached, and that Ortmann was then responsible for his share of the judgment; but Jerome said he would not jeopardize the position of Rothschild, and that he did not then care to take the money from both parties, because he did not need the money, and it was drawing interest; and that it was then and there agreed between Jerome, acting for plaintiffs, and defendant Rothschild, that Jerome should proceed and collect of Ortmann his share of said judgment at the expiration of said four months, or at such other time as Jerome

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should deem it advisable to press Ortmann for the same, and that upon doing so Jerome should notify defendant, and he promised to immediately send his half of such judgment. He admits that after this conversation an *alias* execution was issued, and returned unsatisfied as to both defendants, but says he was not notified, and that Ortmann has become wholly insolvent. Other matters are set up by way of avoidance, but the above is the most relied upon. He avers his willingness still to pay one-half of the judgment, but asserts that the foregoing constitutes a good defense to the collection of the other half.

This answer, being used in opposition to the motion for the appointment of a receiver before the time for replying had expired, could only be treated as an affidavit.

To meet the matters set up in the avoidance, the affidavits of John Rankin and Timothy Jerome were filed, and permitted to be read by complainant. Counsel for defendant Rothschild claims that this was not permissible. But we think it was. The answer did not deny the equity of complainant's bill, except in the attempt to assert that defendant Rothschild had property liable to execution which might have been levied upon by the sheriff. But a general assertion of this kind amounts to nothing in a bill for discovery, as a judgment creditors' bill is in some respects. The defendant must state what and where the property was that the sheriff ought to, but did not, seize. The answer is silent upon these facts. Besides, the return of the sheriff was conclusive upon the defendant at this stage of the proceedings.

The judgment, as before stated, was against the defendants, Rothschild and Ortmann, jointly. It was the duty and legal obligation for Rothschild to pay the whole as much as it was to pay one-half. He could have paid the

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judgment to the sheriff, or tendered it to the plaintiff, with the costs and sheriff's fees, at any time, and then proceed for contribution against his joint obligor, if he was entitled to contribution. He does not pretend that time was extended to Ortmann upon any consideration which would make such extension binding in law. He does not claim to occupy the position of a surety. He says that Jerome told him that he had given Ortmann his word. But this did not prevent the Jeromes from proceeding at once, or prevent Rothschild from paying and proceeding at once, against Ortmann. Aside from this, the affidavits filed in opposition to the new facts set up in the answer contradicted all such statements.

It is claimed in the brief of counsel that the affidavits were filed without notice to them, and that they had no opportunity to reply thereto. The record does not disclose that the defendant made any objection to these affidavits being filed or read. Had objection been made, and time requested, we have no doubt that the judge would have granted any reasonable demand.

Jurisdiction in chancery, as to the county in which a bill may be filed, is regulated by statute, and, under section 6612, How. Stat., the circuit court for the county of Mecosta had jurisdiction to entertain the case.

It was not necessary for complainant, as assignee of the judgment, to cause an execution to be issued and returned *nulla bona*, after he became such assignee, before he could file a creditors' bill. *Gleason v. Gage*, 7 Paige, 121.

Under the circumstances appearing in the bill and answer, Ortmann was not a necessary party to the suit. The bill shows that an execution was returned against him unsatisfied, and the answer asserts that he is insolvent and worthless. There is no dispute over the amount due to complainant, and there is no occasion which

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requires the presence of Ortmann either for an accounting or other relief between these parties. *Williams v. Hubbard,* 1 Mich. 446.

The judge had jurisdiction to appoint a receiver, and we think he exercised his discretion properly. The record does not afford an excuse for appealing, and, under the circumstances the order was not appealable. The appeal is dismissed, with costs, and the record will be remanded for further proceedings.

The other Justices concurred.

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GREGORY NOLAN v. EDWARD E. NOLAN EL AL.

Equity—Bill filed to set aside deed, etc.—Fraudulent conveyances.

1. A father, at the urgent request of his wife and son, conveyed his homestead to his son, who executed to his father and mother a life lease of the property. The expressed consideration in the deed was $500, and the estimated value of the property was from $3,000 to $5,000. The lease was kept by the mother, and practically out of the father's control. Afterwards, the father was induced to consent to the conveyance by the son to his mother of the south half of the premises, on the understanding that she was to deed to him half of a lot she owned, which she failed to do, and afterwards conveyed it to her son, and conveyed the south half of the other lot to a daughter, who gave her back a life lease in her individual right. Domestic troubles increased after this, if they did not substantially begin, and the father commenced litigation to recover his property, which led to a so-called settlement by which he released all of his interest in the north half of the lot to his son, receiving $400 in cash and an agreement from the son to support him comfortably in his home during his natural life, or, at the father's option, to secure for him a home at a hospital in the city for life. This agreement provided for

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$1,000 stipulated damages, if not performed, but was unsecured. At this time complainant executed quitclaim deeds to his son and daughter of all of his interest in the premises originally deeded to his son. He was refused admission at the hospital, and filed a bill to secure a reconveyance of the property, and for an accounting for rents and profits; and he is held entitled to a reconveyance, from the son and daughter and mother, of the north half of the lot originally deeded to the son, or, if they prefer, to the sum of $1,500, adequately secured, and payable in installments.

2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—In cases involving family transactions, where the testimony of the parties is conflicting, circumstances are important factors in getting at the truth.

b—In case of a joint lease to husband and wife, which does not come within the rules applicable to tenants in common, the husband's common-law rights as head of the household are important.

c—A wife cannot stipulate for giving any one a home in her husband's household.

d—An unsecured agreement from a son for the life support of his father, in exchange for property of which the father denudes himself, is unconscionable, unless very evidently safe.

Appeal from Wayne. (Reilly, J.) Argued October 10, 1889. Decided November 15, 1889.

Bill for a reconveyance of property, and for an accounting for rents and profits. Complainant appeals. Decree reversed, and one entered in accordance with opinion, in which the facts are stated.

James H. Pound, for complainant.

James C. Smith, Jr. (*John H. Bissell,* of counsel), for defendants.

CAMPBELL, J. Complainant brought his bill against Mary A. Nolan, his wife, and his son, Edward E. Nolan, and his daughter, Annie A. McPherson, to obtain redress

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for a series of transactions whereby he claims he was defrauded and cajoled out of his property.

As he sets up and shows, he was, in 1880, owner of lot 1, on the Chene farm, on the corner of Chene and Larned streets, in Detroit, of considerable value, varying in estimates from $3,000 to $5,000, as also of some other property. By various arrangements with members of his family, he has been deprived of all his property. He claims that this result was brought about by fraudulent means, and seeks relief to restore him to his rights in whole or in part, as practicable. Lot 1 has by these transactions become vested, one-half in fee and the other half for life, in his wife, Mary Ann Nolan; the reversion of the southerly half being in Annie A. McPherson, as the abstract of title in the case indicates, as made up when the bill was filed. The court below dismissed the bill, and he appeals.

The case is one of peculiar hardship, and complainant's equities are very strong. It is not pleasant to deal with family dissensions, and it is not desirable to spread upon our records any more than is necessary to dispose of the controversy. As far as necessity requires it, the reference will be made.

In June, 1880, complainant and his wife had lived together a good many years, and had two children in early manhood and womanhood, who had been afforded means of education of an excellent character, at considerable expense, and who about that time were married. The wife owned a lot on Orleans street, worth $4,000 or $5,000, improved in part by complainant's means, from which some revenue was derived, and the husband owned the lot on Chene street, and other property near by. He had been industrious and saving, and some help had been given by the wife in earning money for joint account, but we think not to any large extent. Up to that time

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there seems to have been no special, if any, discord. At this time complainant was urged by his wife and son to convey the principal lot on Chene street to the son. It is unfortunate that upon most of the family transactions the parties testify against each other's statements to a great extent, and we must settle the facts as well as we can. But circumstances here, as in most such cases, are important factors in getting at the truth, and they seem to us very convincing. It is plain to our conviction that the wife had become desirous of getting everything under her own control, and while she seems to have had an attachment to her children, she evidently had no wifely attachment to her husband, and no regard for his interests. The children appear by the record in a rather more favorable light, and, while their conduct is not free from censure, it appears to have been much under the prompting or influence of their mother.

The land was conveyed to Edward Nolan, and he gave back a life-lease to his father and mother jointly. The deed contained an expressed consideration of $500. How far this was nominal and how far real is not easy to determine, and is perhaps not now necessary to decide. The father was evidently attached to the son, and soon after spent some $500 or more in building another house on the property conveyed. As this lease was a joint one to husband and wife, and did not come within the rules applicable to tenants in common, the husband's common-law rights as head of the household were important. This lease was not recorded, being unacknowledged. It was subsequently certified as acknowledged by the justice who witnessed it. Thereafter it was, as we think very clearly shown, kept in Mrs. Nolan's custody, and ultimately, if not always, practically kept out of complainant's control.

In March, 1881, complainant testifies he was induced

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to consent to the conveyance by Edward to his mother of the south half of lot 1, on the understanding that she would give complainant half of her Guoin-street property. After the conveyance to her she did not convey the land as she agreed, and ultimately she conveyed it to her son. An attempt was made to show that she was willing to deed to complainant, but we do not give credit to the testimony, as there could have been no reason for not carrying out her purpose, if intended. The testimony on this subject of the Guoin-street lot is neither credible nor consistent. In July, 1881, Mrs. Nolan conveyed the south half of lot 1 to Annie McPherson, who gave back a life-lease to her individually. Both of these papers were left unrecorded till after the compromise hereafter referred to, in March, 1883. But from this period domestic troubles increased, if they did not substantially begin, and complainant was practically crowded out, if he was not driven out, from his home comforts. He was entirely beggared, so far as any control of property was concerned.

It is claimed that his temper was cantankerous and provoking, and that he made his misfortunes himself. It is probable that he became exasperated, and it is not strange that he showed unpleasant dispositions. But the record does not show, except by some testimony which is not harmonious with circumstances, that so long as he kept control of his own property there was any such extreme ugliness or anything unusual. That he labored and saved for his family is shown clearly, and there is nowhere any evidence that he was selfishly disposed against them. But, if their conduct was such as he claims, it would have required a degree of humility and patience beyond any legal requirements to submit to it with equanimity.

As soon as he was apparently cut off from his legal

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rights, there was evidently no disposition anywhere to compensate him. He commenced more or less litigation to obtain redress, by suits against his wife and his son. How or why these attempts were not carried further the record does not clearly show, except that the suit against his wife led to the settlement. But it does show that his wife, and to some extent his children, did not quit scheming, and from the result of the alleged compromise, in 1883, it is manifest that they had been anxious to get rid of his equities, and were not anxious to do so fairly, and were probably no more candid to counsel than to others.

On that occasion he ostensibly settled, on the terms that he should receive from Edward $400 cash, and provision for his comfortable sustenance for life, and he released all his estate for life or for years in Edward's north half of the premises,—a release that was evidently deemed important in spite of the assertions of the witnesses that it had long before been given up. There was no written evidence of his wife's agreement to give him part of her Guoin-street property in exchange for the south half already deeded to her. This alleged settlement was on March 15, 1883, and it requires notice. The wife was not brought into it, except as getting some advantages.

On that day, in pursuance of the negotiations then held, a written agreement was sketched out, whereby Edward and Mrs. McPherson were to pay complainant $400, and keep him, at his choice of either of their homes, and give him a comfortable home and support for life, or, at his option, to secure him a home at St. Mary's Hospital for life in the same way. This paper, drawn up in pencil, was objected to because he did not wish to have Mrs. McPherson in it. Her name was struck out, without any other change, and it was finally

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understood that a new copy, in substance, should be prepared for execution shortly, and this was signed in the mean time. Complainant executed at this time three quitclaim deeds, which covered everything in which he was supposed to set up or to be likely to set up any claim. The $400 was paid. One of these deeds was a quitclaim to Annie McPherson of the south half of lot 1, and one a similar deed to Edward of the north half. These deeds were put on record the same day, and at the same time the older deeds between Mrs. Nolan and her daughter were recorded, and Mrs. McPherson put a mortgage on her land. Six days thereafter Edward conveyed the north half of his lot to his mother in fee. It does not appear just how soon afterwards the perfect copy of the agreement of compromise was prepared and signed by Edward. Complainant refused to sign it, and the reason testified to is stated, with some vagueness, as arising from some deeds of which he was ignorant. He was left by this agreement—allowing it to be what he actually agreed upon—with the alternative of a choice between Edward's house and St. Mary's Hospital, with a sum of $1,000 stipulated damages for failure of Edward's unsecured agreement. St. Mary's Hospital declined to receive him.

It is claimed for the defense that in all his dealings he was fully advised and had his interests looked after. If, however, he was ever so honestly advised into a transaction fraudulent in law and fact, as he claims this to have been, that may absolve his advisers, but it will not necessarily relieve the parties who got the advantage of him, and who very possibly, if not probably, managed to mislead everybody.

Certain facts stand out very unpleasantly in this arrangement. Why he objected to Mrs. McPherson's name in the papers does not fully appear, but he might very well have been advised that her signature would

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be a nullity, as she could not stipulate for giving any one a home in her husband's household, and the contract would not be a charge, as drawn, on any property she possessed. But why Mrs. Nolan was not made a party, either to furnish a home or to secure in some way the obligation for which she meant to get the benefit, is not so manifest. And why no security was required of Edward is not explained. An unsecured agreement of this kind, in exchange for property of which a father denudes himself, is unconscionable, unless very evidently safe, as it certainly was not here.

But the contract was otherwise illusory. It appears to us, although there is some dispute, that on that occasion it was known that the old man could not live at Edward's, and that the refuge at St. Mary's was what he would choose. Edward's wife was not disposed to treat him pleasantly. Under these circumstances, the suggestion that he then knew he would not be received at St. Mary's is incredible. It also appears it was undoubtedly in some way impressed on him that he could go there, and stay there if he obeyed the rules. The steps almost immediately taken to get the property transferred from Edward to Mrs. Nolan were strong indications of the fraudulent purpose of the mother, and of the fraud or weakness of Edward, and the haste to record the deeds is significant. The result of this settlement was that complainant became stripped of all his property, and his wife got control of it for herself and her daughter, and he got nothing but $400, which was much less than the value of its previous use, with an impracticable contract, vague in character, and purely personal, which secured him no home or support, and gave him only an unsecured claim for damages, which was contested as soon as set up.

No amount of plausibility can exonerate Mrs. Nolan and Edward from the guilt of scheming to absorb the complain-

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ant's property, and cheating him out of any consideration for it. The steady and consistently selfish management of Mrs. Nolan shows her hand in it from the beginning. She has the usufruct of all the property, and the fee to the best part of it, and is therefore in a position to be compelled to do such approximation to justice as is practicable. No injustice to her would be done by opening the whole series of dealings, especially as the settlement was intended to prevent him from pursuing his claims for redress, and except as to the $400 was practically a fraud itself. It was immediately aimed at avoiding the specific performance of the agreement to convey to him the Guoin-street property, and Mrs Nolan was in this the chief agent or party interested, although the occasion was used to get other releases. But as a result of these transactions the titles have all become beyond easy reach, except what Mrs. Nolan herself retains.

It would do no injustice to put back the whole title in complainant. But we are inclined to confine relief to a moderate provision. Complainant will be entitled to a reconveyance of the north half of lot 1, on the Chene farm, being the property he conveyed to Edward in the first instance, which, for reasons appearing in the record, we shall require to be joined in by all the defendants, and the decree in the meantime to stand in lieu of a conveyance. But in case defendants shall prefer to secure him by adequate security, to be approved by Judge Reilly, in the sum of $1,500, and to be executed within 30 days, with or without personal liability, such security may stand in place of the said reconveyance. It shall provide for the payment of $500 within a year from the date of this decree, and the balance in four equal yearly installments, without interest until after each shall become due. Complainant to recover costs of both courts.

The other Justices concurred.

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MARY FIELD AND ALICE WOODBRIDGE, EXECUTRICES, ETC., v. CONRAD CLIPPERT.

Trial—Directing verdict.

Directing a verdict for the defendant in a replevin suit before either of the parties has rested, and while the case was in the hands of the defense, and the plaintiffs stated that they desired to offer further testimony, among which was the appraisal of the property, is error, calling for a reversal.

Error to Wayne. (Gartner, J.) Argued November 6, 1889. Decided November 15, 1889.

Replevin. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Griffin, Warner, Hunt & Berry, for appellants.

James H. Pound and *Ed. E. Kane,* for defendant.

LONG. We shall not discuss this case, or pass upon any of the questions raised in the record, except the action of the trial court in disposing of it before the parties or either of them had rested.

The action was replevin. After the plaintiffs had introduced their testimony, and while the case was yet in the hands of the defendant, the court directed the jury to render a verdict for the defendant for a return of the property. The facts in relation thereto, as stated in the record, are as follows:

"Mr. Kane [attorney for defendant] stated that he wished to offer further testimony to show the fraudulent character of the transaction in the execution of the mortgages in suit, and to show that the corporation was insolvent at the time the mortgages were executed, and that the entire claim which resulted in the Free Press

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judgments was contracted between the date of the executions and the time they were placed on record.

"After argument by Mr. Griffin on behalf of the plaintiffs the court stated that he was ready to dispose of the case.

"*Mr. Griffin.* I wish to offer some further testimony. I offer in evidence the amount of the appraisal, with the writ of replevin.

"*Court.* Gentlemen of the jury: It appears from the testimony in this cause that on the twenty-first day of April—

"*Mr. Griffin.* Excuse me, your honor, but I except to the action of the court in proceeding to dispose of the case before either the plaintiffs or defendant has rested."

Notwithstanding this request, the court proceeded with his statement of the case to the jury, pointing out the reasons why the plaintiffs could not recover, and directed a verdict for the return of the property.

This was error. It is claimed that, plaintiffs' counsel having stated just what testimony he proposed to offer, the court had a right to assume that he did not propose to offer any other. What took place there, as appears by the record, does not warrant this conclusion, and the plaintiffs had the right to put in evidence the appraisal under the writ of replevin. The court was clearly in error in thus summarily disposing of the case. The judgment must be set aside, and a new trial ordered. The costs will abide the event of the suit.

The other Justices concurred.

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HIRAM HARRINGTON ET AL. v. JOSIAH UPTON ET AL.

Executions—Bill in aid of—Validity of mortgage—Foreclosure—Equity jurisdiction.

1. Where judgment creditors file a bill in aid of execution, and join as defendants *prior* attaching creditors, who have levied upon the land to satisfy the judgment rendered in the attachment suit, and who also hold a mortgage upon the property having priority over complainants' lien, and who in their answer claim the benefit of a cross-bill, and pray for the foreclosure of their mortgage, a statutory foreclosure of which was enjoined in said suit at the instance of complainants, the court on dismissing the bill should decree such foreclosure.
2. A mortgage executed by a debtor to secure his creditor for his debt, and also to secure a debt due another creditor, which the mortgagee agrees to pay, is not in fraud of other creditors.[1]

Appeal from Gratiot. (Hart, J.) Argued October 17, 1889. Decided November 15, 1889.

Bill in aid of executions. Complainants appeal from decree dismissing bill. Affirmed. The facts are stated in the opinion.

C. J. Willett, J. K. Wright, and *B. H. Scovill,* for complainants.

C. W. Giddings (*Newell Leonard,* of counsel), for defendants.

William A. Bahlke, special solicitor for defendant Kinter.

[The briefs of counsel are mainly confined to a discussion of the testimony.—REPORTER.]

[1] See *Gore v. Ray,* 73 Mich. 385 (head-note 3), for an important case touching this subject.

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LONG, J. The bill was filed in this cause in aid of executions, to set aside a certain deed and mortgage.

It is claimed by the bill that complainants Harrington and Saviers, on November 7, 1884, obtained judgment before a justice of the peace against defendant Johnson and one Thomas J. Lyon for $189.68, and $5.55 costs; that on the same day complainants Harrington and Saviers also had judgment before the same justice against defendant Johnson and said Lyon and one Aciel F. Wright for $183.76, and $6 costs of suit; that on the same day complainants Harrington and Saviers also had judgment before a justice of the peace against defendant Johnson and said Lyon for $202.97, and $5.55 costs; and also judgment against defendant Johnson, Wright, and Lyon for $153.21, and $6 costs; that on November 21, 1884, transcripts of these several judgments were filed in the Gratiot circuit court, and on the same day executions were issued thereon, and duly levied upon the north-west quarter of section 6, town 12 north, of range 3 west, Gratiot county, Michigan; notices of these levies being duly filed in the register's office on November 25, 1884.

The bill also alleges that the complainant Case, on March 28, 1885, obtained judgment in the circuit court for Gratiot county against defendant Johnson and one Myron F. Frost for $249.77, and $23 costs of suit; and also another judgment in the same court against defendant Johnson and Thomas J. Lyon for $206.87, and $24.57 costs; that executions were issued on each of said judgments on April 15, 1885, and levied on the same day, on the land hereinbefore described, notices of such levies being duly filed.

The bill further alleges that on May 1, 1885, and for more than five years prior thereto, defendant Johnson had title to said described land.

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It is further alleged that Darragh & Co., on October 3, 1884, commenced suit by attachment against defendant Johnson and Thomas J. Lyon, and levied such writ on the premises before described, and that afterwards judgment was rendered in such case for $523.77, and $28.49 costs. Execution was issued and levied on said lands, December 10, 1884.

It is further alleged that on September 9, 1884, defendant Johnson made, executed, and delivered to defendant William H. Kinter a mortgage upon said premises for the sum of $2,500 payable on or before three years from date, and that said mortgage was duly recorded on said day, and that on February 8, 1886, Kinter assigned this mortgage to defendants Darragh & Co.; such assignment being duly recorded in the register's office of that county; that defendant Johnson was indebted to complainants during that time. It is further alleged, on information and belief, that Johnson executed and delivered this mortgage to Kinter with intent to defraud complainants and his other creditors; that it was made without consideration, and with an understanding and agreement that Kinter should discharge it when requested by Johnson; that Darragh & Co. knew the mortgage was fraudulent, and took the assignment without consideration, and with the intent to foreclose it and cut off the claims of the complainants, obtain title to the premises, and to pay any balance over to Johnson. That, in furtherance of said scheme to defraud the complainants, on April 19, 1887, Johnson deeded said premises to Annie P. Darragh, wife of Archibald B. Darragh, by quitclaim, for the consideration of one dollar; that on April 19, 1887, Darragh & Co. commenced foreclosure proceedings by advertisement under the power of sale contained in the mortgage, and for a sale of the premises on July 16, 1887, and that the mortgage is being foreclosed for the sum of $435.72

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claimed to be unpaid interest; that Johnson had no other property liable to execution.

The bill prays that the mortgage and assignment, and the deed to Mrs. Darragh, be set aside, and the foreclosure proceedings and a sale of the premises enjoined.

The defendants filed a joint answer, and admit the judgments of complainants Harrington and Saviers, the taking and filing of the transcripts, and issue and levy of executions thereunder; deny the validity of the first Case judgment in the Gratiot circuit court, and leave the complainants to prove the judgment of Case of April 2, 1885; also deny the validity of the levies under the executions of April 15, 1885; admit the title to the premises was in Johnson on May 1, 1885, and five years prior thereto; also admit the execution and delivery of the mortgage from Johnson to Kinter, and the assignment to Darragh & Co.; allege the validity of the mortgage, and full consideration paid therefor as well as for the assignment.

The answer also denies that at the time the mortgage was executed there was an understanding between Johnson and Kinter that Kinter should, without consideration, assign or discharge said mortgage when requested by Johnson; and alleges that said mortgage was made for the purpose of securing to Kinter the sum of $2,500; that Johnson was indebted to Kinter in the sum of $1,700, for moneys loaned to Johnson prior to and upon the day said mortgage was executed; and that a portion of said sum was loaned prior to the time Johnson indorsed the notes upon which complainants' judgments were rendered.

Defendant Johnson, answering, says that prior to the date of said mortgage he was indebted to Darragh & Co. upon his individual notes, and by way of indorsement, in the sum of about $800; and, being desirous of securing said Darragh & Co., he entered into an agreement with

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said Kinter to pay said sum; and Johnson and Kinter, answering, say that at the time of the execution of said mortgage the consideration named therein, and for which said mortgage was given, was $800, due to said Darragh & Co., $1,400, due said Kinter for moneys previously loaned to said Johnson by him, and the payment of the further sum of $300, loaned at the time of the execution of the mortgage, and that said mortgage was made, executed, and delivered in good faith, and for a valuable consideration.

Defendants Darragh & Co. deny that any agreement was made or understanding had that upon their taking such assignment they were to foreclose, pay their claim out of the proceeds, and return any balance to Johnson; but allege that they knew nothing of the execution of the mortgage until some time thereafter, and that subsequently he (said Darragh) had a conversation with Johnson and Kinter, in reference to the giving of the mortgage, and was informed by each of them that it was given for the purpose of securing the payment of the sums due Kinter and Darragh & Co., and Kinter then promised to pay the sum so due Darragh & Co.; that, Kinter failing to so pay said sum, Darragh & Co. purchased from Kinter the said mortgage, and paid Kinter the amount due thereon, $1,846.70, over and above the claim of Darragh & Co.; and that Darragh & Co. are the legal and equitable owners of said mortgage, and that it is a subsisting lien upon said premises for the full amount of both principal and interest.

The answer admits the making of the deed to Annie P. Darragh, but denies that it was done for any illegal purpose; also admits the commencement of foreclosure proceedings as stated in the bill. Some other matters are also alleged in the answer in reference to the Harrington and Saviers judgments, claiming that the same

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have been paid and satisfied, and it denies that Case has a claim for the amount stated in the bill; but, from our view of the case, these matters need not be considered.

Defendants Darragh & Co. aver also in the answer that they have been put to $54.45 costs in the foreclosure, which they have altogether lost by the issuing of the injunction upon the filing of the bill.

Defendants also claim the same rights and benefits under their answer as if they had specially demurred to the bill of complaint, and defendants Darragh & Co. ask that their answer be treated as a cross-bill, and they granted affirmative relief by decreeing to the defendants a foreclosure of the mortgage which is now due, both principal and interest, and that said complainants' levies, if valid, are subject to said mortgage, and that complainants be restricted to their rights as subsequent incumbrancers. Defendants Darragh & Co. also ask personal decree against complainants for the amount of their costs incurred in the foreclosure proceedings, which they have paid, to the sum of $39.45, and $15 attorney's fee provided by the statute, and that complainants' bill be dismissed, with costs.

Defendant Johnson claims that at the time the levies were made by complainants he was living on these premises, and occupying the same as a homestead, and asks that his homestead interest be protected. Replication was filed, and a large amount of testimony taken.

On the hearing in the court below, upon pleadings and proofs, the court dismissed complainants' bill, with costs, but granted no other relief to defendants. Complainants appeal.

From a careful reading and consideration of the testimony taken, which is all returned here, we are satisfied

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that the decree entered below did no injustice to the complainants. If any one had cause to complain, it was the defendants Darragh & Co. The court had jurisdiction of the whole subject-matter, and should have decreed foreclosure of the mortgage in the proceedings, as well as have granted the other relief asked by these defendants; but they did not appeal, and the relief cannot be granted here.

It must be conceded that the claim of Darragh & Co. had priority of lien over the levies under the complainants' executions, and that it is established as a *bona fide* claim under levy of valid attachment, followed by a levy under the execution levied upon the judgment obtained in that proceeding. Whatever advice Darragh & Co. may have had or what Darragh may have said about the invalidity of the Kinter mortgage could in no sense affect the validity of their execution levy or the priority of their lien.

The only question in dispute, upon the facts, relates to the validity of the mortgage given to Kinter. A great amount of testimony was taken bearing upon that question, but a discussion of it here would not profit the parties to this controversy or any one else. It is purely a question of fact whether Kinter had loaned Johnson the money he claims to have loaned prior to the execution of the mortgage, and whether he loaned him the $300 at the time of its execution, and also agreed to pay the Darragh & Co. claim,—if that was included in the mortgage by Johnson. Kinter and Johnson both testify to the amount loaned before the mortgage was made, and the payment of the $300 at the time of its execution, and as positively assert that the Darragh & Co. claim was included in the mortgage.

Some discrepancies are pointed out in the brief of

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counsel in Johnson's testimony, as well as in Kinter's, and great stress is laid upon the fact that Darragh said he believed the mortgage was fraudulent. But, upon a careful reading of all the testimony, we think the complainants have not established the claim in their bill that the mortgage was given without consideration, or that Kinter did not pay to Johnson the amounts he claims both before and at the time of the execution of the mortgage. Neither is the testimony of Darragh contradicted that he paid to Kinter the amount of Kinter's claim when the mortgage was assigned, except by inferences drawn by counsel from the circumstances surrounding the case.

Johnson had the right to prefer Darragh & Co., and put the amount of their claim in the mortgage. It was no fraud upon the other creditors, and, if it was actually made a part of the consideration of the mortgage, Darragh & Co. had the right, when advised of it, to accept its terms, and, doing so, the other creditors whose liens were subsequent to Darragh & Co. have no right to complain.

We do not see how the taking of the deed to Annie P. Darragh affects this controversy, even as a circumstance to throw any suspicion upon the validity of the mortgage.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

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JOHN FULLER ET AL. v. CHARLES H. RHODES, PRINCIPAL DEFENDANT, AND THE MICHIGAN CENTRAL RAILROAD COMPANY, GARNISHEE DEFENDANT.

Chattel mortgages—After-acquired property—Future indebtedness —Garnishment.

In this case it is held that a chattel mortgage executed by the principal defendant, and duly filed, to secure existing and future indebtedness, and covering future acquired property, and also all notes and accounts due or to become due the mortgagor, which the mortgagees were authorized to collect, was notice to the plaintiffs, and to all other persons, of the rights of the mortgagees in the property covered by said mortgage; and that under it they are entitled to receive from the garnishee defendant the sum of $600 due the mortgagor on book account, arising largely from the purchase of posts, wood, and ties which were owned by the mortgagor at the time he executed the mortgage, it appearing that the mortgagees intended to retain their lien on said property to secure the payment of the indebtedness secured to them by said mortgage.

Error to Bay. (Cobb, J,) Argued October 18, 1889. Decided November 15, 1889.

Garnishment. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Shepard & Lyon, for appellants, contended:

1. No title passes under a chattel mortgage, even though default is made in its conditions, but a foreclosure and sale is necessary to transfer the title; citing *Van Brunt v. Wakelee*, 11 Mich. 177; *Lucking v. Wesson*, 25 Id. 443; *Haynes v. Leppig*, 40 Id. 602.

2. The provision in the mortgage relative to the notes and accounts amounted simply to a power, and until acted upon by the mortgagees, and the proceeds reduced to their possession, such

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notes and accounts were liable for the payment of the debts of the mortgagor; citing *Holmes v. Hall*, 8 Mich. 66; *Dalton v. Laudahn*, 27 Id. 529.

3. The mortgage, if not fraudulent at its inception, became such by the fraudulent use made of it by the mortgagees. It made a debtor with ample property to pay his debts practically insolvent, and the mortgagees endeavored to control the property for his benefit in such a manner as to defeat the claims of creditors.

Edgar A. Cooley (*J. L. Stoddard*, of counsel), for defendants, contended:

1. Where it is not claimed that there was no evidence tending to support findings of fact, a bill of exceptions becomes immaterial, and should not be examined; citing *Scotten v. Sutter*, 37 Mich. 526; *Johnson v. Crispell*, 43 Id. 261; *Farrington v. Sexton*, Id. 454; *Kane v. Stowe*, 50 Id. 317; *Kundinger v. Railway Co.*, 51 Id. 185.

2. The court will only ascertain whether the conclusion of law is a correct deduction from the facts found, or, more properly speaking, whether, upon the facts found, the plaintiffs are entitled to a judgment; for, unless the facts found entitle plaintiffs to a judgment, they have failed to make a case, and judgment must pass for the garnishee defendant, as no additional facts can be presumed; citing *Mitchell v. Chambers*, 43 Mich. 150, 158; *Johnson v. Crispell*, Id. 261; *Randall v. Randall*, 37 Id. 563, 570; *Leitelt v. Parker*, 48 Id. 297; *Robinson v. Smith*, 63 Id. 350.

3. Fraud is a question of fact, and even where there is evidence tending to show fraud, unless the trial court finds that there was in *fact* fraud, it cannot be presumed to exist; nor has this Court any jurisdiction to review the findings in respect thereto; citing *Johnson v. Crispell*, 43 Mich. 261.

LONG, J. Plaintiffs in February, 1888, brought an action of *assumpsit* against defendant, Charles H. Rhodes, in the circuit court of Bay county, and on February 29, 1888, a writ of garnishment was issued out of that court in the cause, directed to the Michigan Central Railroad Company as garnishee. Disclosure was made by the railroad company, admitting an indebtedness of $600. Afterwards a second disclosure was filed by the garnishee,

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also admitting the indebtedness of $600, but disclosing that the moneys were claimed by W. I. Brotherton & Co., on the ground that they had a chattel mortgage bearing date December 9, 1887, upon the property sold to the garnishee by the principal defendant, and upon the proceeds thereof.

The cause came on to be heard before the court without a jury, and W. I. Brotherton & Co. appeared, and took charge of the defense, and contested the right of the plaintiffs to recover from the garnishee. The circuit court, at the request of the plaintiffs, made written findings of fact and conclusions of law, as follows:

"That on December 9, 1887, Charles H. Rhodes was, and for many years had been, a resident of Bay City, in Bay county, and engaged in the business of making, buying, and selling railroad ties, wood, posts, and other forest products; that said Rhodes procured said ties partly from his own lands, and partly by purchase, and had at all times considerable quantities thereof on hand, and in process of manufacture, at different points along the Michigan Central Railroad and its branches, from Kawkawlin, in Bay county, north to the Straits of Mackinaw, and on December 9, A. D. 1887, he had a considerable quantity of such ties on hand; that all the ties so purchased or manufactured by said Rhodes were by him sold to the said garnishee defendant in this cause, the Michigan Central Railroad Company, and those which he acquired by purchase were hauled out of the woods to points along the line of said railroad, and there inspected from time to time by the inspectors of said garnishee defendant; and such inspection was the basis, not only of the settlement between said Rhodes and said garnishee defendant, but also of the final settlement between said Rhodes and his vendors, but he usually paid for them on estimates made previous to such inspection; and when such payment was made the ties were marked with his mark, and were, as between himself and his vendors, treated and considered as his property, the estimates being subject to correction when the inspection should be afterwards made.

"That on December 9, A. D. 1887, said Rhodes was

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indebted to W. I. Brotherton & Co., a copartnership composed of W. Irving Brotherton, Henry N. Watrous, Orville A. Watrous, and Henry W. Jennison, and doing business at Bay City, in the sum of six thousand four hundred and eighty-nine dollars and ninety-four cents ($6.489.94), and on that day, and in order to secure the payment thereof, and of such indebtedness as he might afterwards incur to them, said Rhodes executed and delivered to said W. I. Brotherton & Co. a mortgage, a copy of which is appended hereto, and made a part hereof; and on the 22nd day of the same month said mortgage was duly filed in the office of the recorder of said Bay City, said city having no officer known as city clerk.

"That, after the making of said mortgage as aforesaid, said Rhodes continued to purchase from W. I. Brotherton & Co., from time to time, supplies to use in the prosecution of the work of getting out such ties and other forest products, and also from time to time made payments in the manner hereinafter shown, to apply on his indebtedness to them;. so that on February 29 his indebtedness to them amounted to nine thousand three hundred and five and 86-100 dollars ($9,305.86), and it now amounts to nine thousand three hundred and twelve and 6-100 dollars ($9,312.06).

"That said Rhodes had an account at the Bay City Bank, in Bay City, and was, at all times, allowed to check against said account, and said bank from time to time made advances to him on said account, to enable him to carry on his business, and the following course of dealing was established between said Rhodes and said bank, viz.: Said bank paid at maturity all papers given by said Rhodes to said W. I. Brotherton & Co., and all paper given by him to other persons, in the prosecution of his said business, and checks drawn by him for money used in said business, and said bank relied upon the monthly sales of ties and timber, hereinafter mentioned, to make said account good and repay advances.

"That once in each month said garnishee defendant paid for all the ties and timber purchased of said Rhodes during the preceding month, and, whenever the amount of any monthly payment about to be made was ascertained, said Rhodes ordered the same to be paid to said bank, and it was so paid, and was by said bank placed

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to the credit of said Rhodes in his said account. Said Brotherton several times asked said Rhodes why he (said Rhodes) did not give the orders for said monthly payments to said W. I. Brotherton & Co., instead of giving them to said bank, and was told by said Rhodes, in reply, that the cashier of said bank wanted the money paid to the bank because the bank was taking care of the paper given by said Rhodes to said W. I Brotherton & Co., and was to make advances to said Rhodes, and was willing to make such advances if said Rhodes would give it the said orders on said garnishee defendant, and notify the cashier from time time of the amount of ties on hand so that the repayment of such advances would be secure, and thereupon said Brotherton consented to the giving of the orders to the bank, as aforesaid, and the same course of dealing was continued; said W. I Brotherton knowing of such sales, and consenting thereto, on condition that the notes of said Rhodes given to them from time to time, and his indebtedness to them on account, were paid at maturity, but always intending to retain their lien on the ties and timber sold, or the proceeds thereof, to secure the payment of the indebtedness of said Rhodes to them, all of which was distinctly understood between them and said Rhodes. But there was no understanding or agreement whatever between said garnishee defendant and said W. I. Brotherton & Co. relative to such sales, or the application of the proceeds thereof.

"That whenever said bank received money from said garnishee defendant, as aforesaid, the same was by said bank first applied to pay advances made by the bank to said Rhodes, paper given by said Rhodes to the said W. I. Brotherton & Co., and paper given by him to other parties for the purchase of supplies used in his said business, and the balance, if any, remained to the credit of said Rhodes, and was used by him in said business, but usually there was no such balance remaining; and I do not find that there was any such balance remaining of the money paid in during either of the months of December, January, February, or March, but I do find that, if there was any such balance remaining during either of these months, it was only in one of those months, and was only a small amount.

"That during the month of December, A. D. 1887, said Rhodes sold to said garnishee defendant—

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Posts amounting to	$ 6 30
Wood amounting to	3 75
Ties amounting to	5,972 43
Making a total of	$5,982 48

"All of which was by said garnishee defendant, on the order of said Rhodes, on January 16, paid to said bank, and then applied in the manner above described; that during the month of January said Rhodes sold to said garnishee defendant—

Wood amounting to	$ 236 60
Ties, at 18 cents each, amounting to	12,299 70
Making a total of	$12,536 30

"All of which was, on the order of said Rhodes, on February 14, paid to said bank, and then applied in the manner aforesaid; that during the month of February said Rhodes sold to said garnishee defendant—

Posts and wood amounting to	$ 438 12
Ties, at 18 cents each, amounting to	5,501 32
Making a total of	$5,939 44

"All of which, excepting six hundred dollars ($600), which was retained to await the result of this suit, was, on the order of said Rhodes, on March 17, paid to said bank, and there applied in the manner aforesaid.

"That at the time of the making of said mortgage said Rhodes owned all the wood and posts, and more than half of the ties, included in said sales of December, January, and February, and, of all the ties which were included in the sales of said months, about four-fifths were acquired by purchase, and not manufactured from his own lands; that on or before February 29, A. D. 1888, said plaintiffs commenced suit in this court against said Charles H. Rhodes, to recover certain moneys alleged to be due to them from said Rhodes, and on the said 29th day of February the garnishee summons in this cause was served on the said Michigan Central Railroad Company, and the $600 mentioned in the disclosure and amended disclosure on file in this cause is the same $600 hereinbefore mentioned, and is part of the proceeds of sales of ties and wood sold by said Rhodes to said garnishee defendant in the month of February; and on

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May 17, A. D. 1888, said plaintiffs recovered judgment in said original suit against said Rhodes in the sum of $525.75.

"And counsel for said plaintiffs, having requested that I find, further, as follows, viz.:

"1. That it appears from the files and records that the judgment against principal defendant was on notes given to plaintiffs in 1884.

"2. That the firm of W. I. Brotherton & Co. kept no record of the quantity of ties sold; that they permitted Rhodes to make sale of the ties, and knew that he was so doing.

"3. That the defendant sold to the Michigan Central Railroad Company ties every month, varying from two thousand to to fourteen thousand dollars.

"4. That defendant put these ties upon the railroad track at different points, between Kawkawlin, near Bay City, and Mackinaw; that he had from seventy-five to two hundred contractors making ties.

"5. That Rhodes checked right along on the Bay City Bank, and, when the money was paid in on the orders, the money was credited up to his account; Rhodes had control of it.

"6. That defendant had control of the money arising from the sale of ties, placed in the Bay City Bank; that with it he paid the notes that Brotherton & Co. had indorsed for him; then paid notes given by him to others, and drew checks upon it, and continued to draw checks upon the bank when no funds were to his credit; that they were honored, and, as the money came in from the sale of ties, it was credited upon his account.

"1. In response to the first of said requests, I refuse to find as therein requested.

"2 and 3. In response to said second and third requests, I do find the facts to be as therein stated.

"4. In response to said fourth request, I find that the general course of business of said Rhodes was as therein stated.

"5 and 6. In response to said fifth and sixth requests, I do not find as therein requested, excepting such facts therein stated as are embraced in my general findings above.

"And said counsel for said garnishee defendant having requested that I further find as follows, viz.:

"That said Rhodes sold said ties to said garnishee defendant at a uniform price of 18 cents apiece, and those which he acquired by purchase were hauled out of the woods to points along the line of said railroad, and were counted up by said Rhodes, or by a man

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employed by him for that purpose, either before or after they were hauled out, and when counted were marked with said Rhodes' mark, and a delivery thereof taken, and payment therefor made, by said Rhodes, and, as between himself and his vendors, said ties were thereafter treated and considered as his property. Said ties were from time to time inspected after being so hauled out, for the purpose of ascertaining whether there were any unmerchantable pieces among them, by inspectors of the said garnishee defendant, and such inspection was the basis, not only of the settlement between said Rhodes and said garnishee defendant, but also of the final settlement between said Rhodes and his vendors."

"In response to such request, I find the facts to be as therein stated, except as to the price of the ties sold, and, as to the price, I find that those sold in December and January were sold for 18 cents each.

"And from the facts so found, I find, as conclusions of law, that said ties, and other timber so as aforesaid sold by said Rhodes to said garnishee defendant, in the months of December, January, and February last, and the proceeds of the sale thereof, were subject to the lien of said mortgage, and that said W. I. Brotherton & Co. are entitled to receive said sum of $600, mentioned in the disclosure and in the amended disclosure in this cause.

"Judgment will therefore be entered in favor of said garnishee defendant, and against said plaintiff, with costs to said garnishee defendant to be taxed, including an attorney fee of twenty-five dollars."

Exceptions were filed to this finding. Judgment was entered in favor of the garnishee defendant. Plaintiffs bring error.

Twelve errors are assigned.

The seventh to the twelfth, inclusive, charge that the circuit judge was in error in not finding the facts as claimed by the plaintiff, and in finding the facts as stated. The errors relied upon here, however, relate to the conclusions of law arrived at by the trial court.

Counsel state in their brief that the conclusions of law of the circuit court were erroneous, and that the facts as found by the circuit court, and shown by the testimony, and set out in the bill of exceptions, entitle

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the said plaintiffs to a judgment for the amount specified in the disclosure; that the money due from the garnishee defendant to Rhodes was not, at the time of the service of the writ of garnishment, subject to the lien of W. I. Brotherton & Co.'s chattel mortgage, and that W. I. Brotherton & Co. were not entitled to recover that sum to the exclusion of the rights of the plaintiffs. We think, however, that the court was not in error in its conclusions of law, under the facts found. The mortgage under which Brotherton & Co. make claim to this fund states an indebtedness to them from Rhodes of $6,489.94, and provides:

"Whereas, the said party of the first part desires to purchase goods, wares, and merchandise, from time to time, from said second parties, upon credit:

"Therefore, in consideration of the premises, and of the sum of one dollar ($1.00) paid by said second parties to said first party, the said party of the first part hereby sells, assigns, and transfers and mortgages, to the parties of the second part, all of the following goods, chattels, and personal property, viz.:

"All the stock in trade, goods, wares, merchandise of every kind and description, and all furniture, counters, scales, desks, lamps, chandeliers, show-cases, safe, and all fixtures, goods, and personal property, situated in and about the general store occupied by said first party, and in which he is carrying on business, at Pinconning, Bay county, Michigan; also all delivery and other wagons, and sleighs, horses, harnesses, and buggies owned by first party, or in which he is any way interested; also all logs, timber, lumber, ties, shingles, and wood, wheresoever situated.

"Also the shingle-mill at Mansfield's Station, on the line of the railroad leading from Pinconning to Gladwin, and heretofore known as the 'Saginaw Bay & Northwestern Railroad,' in Bay county, in said State, and now or heretofore operated by said party, and all machinery, belts, belting, tools, and implements used in or about said shingle-mill, and all other goods, wares, merchandise, and personal property, of every kind and description (excepting household furniture), situated in the dwelling

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occupied by first party, at Bay City, aforesaid, owned by said party of the first part, or in which he is in any manner interested, wheresoever situated, and all goods, wares, merchandise, and personal property of every description hereafter purchased, owned, or held by said first party, or in which he is in any way interested, including, particularly, all shingles that may be hereafter manufactured, and all logs, timber, and lumber, hereafter cut or manufactured, by or for said first party, as well as all goods, wares, merchandise, and personal property hereafter placed in said store, or added to said stock, and all property of every kind at any time in transit.

"Also all notes, accounts, drafts, bills of exchange, now due or to become due to first party, and all such as may be hereafter contracted in his favor in and about the business at any time being carried on by said first party or otherwise, together with all books of account of every description, now or hereafter owned or used by first party,—the said second parties being authorized to collect and receive the moneys due or to become due to said first party at any time, on any and all accounts, notes, drafts, and bills of exchange, and apply the proceeds as hereinafter indicated.

"To have and to hold the same to the said parties of the second part forever.

"Provided, always, and the condition of this obligation is such, that if the said party of the first part pay, or cause to be paid, the aforesaid indebtedness of six thousand four hundred and eighty-nine dollars and ninety-four cents ($6,489.94) or thereabouts at or before the expiration of one year from the date hereof, and shall pay at maturity all bills and accounts hereafter contracted with said second parties by him, and all negotiable paper hereafter given by said first party to said second parties for goods, wares, or merchandise, or upon any valuable consideration, and all negotiable paper hereafter given by way of renewal of any such paper, either heretofore or hereafter given by him as aforesaid, including all negotiable paper heretofore and all that hereafter may be given by said first party as aforesaid, that has been or shall be indorsed by said second parties, and transferred or negotiated by said second parties or by the first party, and shall keep and perform all the covenants and conditions herein contained on the part of the said party of the first part, then this obligation to be void; and the

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said party of the first part agrees to pay the same accordingly. * * * * * * * *

"The party of the first part also agrees to replenish and keep up his stock of goods aforesaid, so that the security hereunder shall be ample and satisfactory to said second parties, and he shall not sell or dispose of the same, or of any part thereof, except in the usual course of retail trade.

"In case default is made in the payment of the indebtedness aforesaid, including as well that heretofore as that hereafter contracted, or of any part thereof, or in the payment of the negotiable paper aforesaid, or any part thereof, including that heretofore as well as that hereafter given, or in keeping up such insurance, or in keeping up the stock as aforesaid, or in any of the covenants or conditions herein contained on the part of said first party, or if said first party shall at any time sell, assign, or dispose of or move the whole or any part of said property, except as hereinbefore specified, or if the said second parties at any time deem themselves insecure or unsafe, then, in any such case, it shall and may be lawful for the parties of the second part, their representatives or assigns, to enter upon the premises aforesaid, or any place or places where said property, or any part thereof, may be, and seize and take possession of the whole, or any part thereof," etc.

This mortgage covers all notes, accounts, drafts, bills of exchange, etc., due or to become due, and authorizes said second parties to collect and receive the moneys thereon. It appears that the account due to W. I. Brotherton & Co. by Rhodes amounted to $9,305.06 at the time of the service of the writ of garnishment, and that the amount of $600 owing to Rhodes from the Michigan Central Railroad Company on that date was on book-account arising largely from the purchase of posts, wood, and ties, which were owned by Rhodes at the time of the execution of the chattel mortgage, and by the terms of which they had a right to demand and receive the money due to Rhodes on account. This mortgage was on file, and therefore was notice to the plaintiffs and to all other

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persons of the rights of Brotherton & Co. in not only the property Rhodes had on hand at the time of the execution of the mortgage, but such as he might afterwards acquire, together with notes, drafts, and accounts which might thereafter be made.

It cannot be said, under the findings of fact of the trial judge, that Brotherton & Co. had ever waived this right, as the court finds that they intended to retain their lien on the ties and timber sold, or the proceeds thereof, to secure the payment of the indebtedness of Rhodes to them. The course of dealing between W. I. Brotherton & Co., Rhodes, and the bank could not affect the rights of W. I. Brotherton & Co. to demand and receive from the railroad company the amount due on this account, under the finding of the circuit judge that they did not intend to release their lien upon the property or its proceeds.

This controversy is not between Brotherton & Co. and the railroad company, or the bank, where Brotherton & Co., by a course of dealing in permitting Rhodes to draw from the funds deposited in the bank by the railroad company, to carry on his business, might be estopped to claim from the railroad company or the bank moneys paid on account to Rhodes, but by one who is not in a position to claim any such equities, and who had full notice of the Brotherton & Co. claim. By the terms of the mortgage, Rhodes was to have the right to sell in the ordinary course of trade, and it was expected that, so far as the dealing in wood, posts, and ties was concerned, he would sell on credit; but Brotherton & Co. at all times, by the terms of their mortgage, could demand and secure the moneys due on account of such sales. They have demanded it here, and must be held to have rights superior to the plaintiffs under their garnishee process.

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We find no error in the conclusions arrived at, under the facts found by the circuit judge, and the judgment must be affirmed, with costs.

The other Justices concurred.

JAMES O'CONNOR v. SARAH LE ROUX.

Replevin—Agency—Submission to jury.

The only question in this case is the authority of the brother of plaintiff to release defendant from the payment of $5 of the price agreed to be paid for a sewing-machine purchased of the plaintiff, the title to which was retained until the purchase price was fully paid, and the Court is unable to say that there was no evidence proper for the jury to consider as establishing such authority.

Error to Chippewa. (Grant, J., presiding.) Argued October 18, 1889. Decided November 15, 1889.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

M. J. Doyle, for appellant.

J. W. McMahon, for defendant.

LONG, J. This is an action of replevin, tried in the circuit court for Chippewa county before a jury.

The property in controversy was a sewing-machine which plaintiff sold defendant under a written contract, by the terms of which the title to the machine was to remain in plaintiff until the amount for which it was sold, $45, was fully paid. This contract was made May

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19, 1885, and $10 paid at its execution. The defendant thereafter paid the whole amount under the contract, less $5, which she refused to pay to plaintiff, claiming that when she made the last payment it was agreed that it should be in full of the contract.

From the testimony of the defendant it appeared that a brother of the plaintiff called upon her for the purpose of collecting the sums due on the contract, and that upon two occasions she made payments to him, the last payment being $10. At the time this last payment was made defendant called his attention to the condition of the wheel of the machine,—that it was rusty; that the brother of the plaintiff then said they would have to send to Detroit for a new wheel, which would cost about $5, but if the defendant would give him all but $5 yet remaining unpaid on the contract, and not bother them about the wheel, they would send her the note or contract, and would not demand the payment of the $5 balance. This $10 was then paid, and, as the defendant claims, was to be in full satisfaction of the note. This arrangement was also testified to by the husband of defendant.

The counsel for the plaintiff claims, however, that this brother had no authority to make such arrangement, and that if any was made it was not binding upon the plaintiff. This raises the only question in the case. The court left the question to the jury for their determination, telling them that if they found from the evidence that the brother of Mr. O'Connor had authority to make such an arrangement the plaintiff would be bound by it; and, the defendant having waived return of the property, they should find for her the value of the property taken. The jury returned a verdict in favor of defendant for $25.

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We think the court was not in error in this charge. From a careful reading of the record, we cannot say that there was no evidence upon this question to go to the jury. We need not point out in what this consists, but from the cross-examination of the plaintiff himself it is made apparent that the brother was authorized to do collecting, and to make compromises on certain classes of these machines. There is certainly some evidence in the case showing this authority, and strong inferences might be drawn from the circumstances of the business methods pursued by the brother, with the knowledge of the plaintiff, from which the jury might well find the authority.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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JACOB SELIGMAN v. ALFRED N. PINET AND HARRY L. SHAW, IMPLEADED WITH ADOLPH A. PINET.

Joint promissors—Release—New agreement—Circuity of action.

An agreement made by *one* of three *joint* makers of a promissory note with the payee, by which the payee agrees that two-thirds of the note shall be collected of the *other* makers, and that the remaining one-third shall be paid by the third maker, by applying thereon one-third of the profits arising from running a boat formerly owned by the three makers, and which the payee had bid in at marshal's sale, to which agreement the other two makers were not parties, but who paid two-thirds of the note to the payee, but not in reliance upon said agreement. will be respected and enforced in a suit by the payee against the three makers brought after such agreement and payment, said

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two makers having been discharged by such payment, and the third maker having the right to pay the remaining one-third according to the new agreement.

Error to Saginaw. (Edget, J.) Argued October 18, 1889. Decided November 15, 1889.

Assumpsit. Defendants Alfred N. Pinet and Henry L. Shaw bring error. Reversed. The facts are stated in the opinion.

Tarsney & Weadock, for appellants, contended:

1. A new contract was entered into between Shaw and the plaintiff, which practically treated the note as a several note, and Shaw was recognized as owing one-third of the indebtedness. The effect of this arrangement was to make a new and substituted agreement with Shaw which released him from his liability on the note, and, if this be so, the effect of his release was to release the other joint makers; citing *Holdridge v. Bank*, 16 Mich. 66; *Mining Co. v. Brady*, 14 Id. 260; 16 Id. 332.

Wisner & Draper, for plaintiffs, contended:

1. The most that can be claimed for the agreement relied upon is that it amounted to an extension of credit for one-third of the note, for an indefinite time which may never come,—that is, until Shaw's profits of the boat were sufficient to pay it. There is nothing in it suggesting even a promise on plaintiff's part not to sue. Such an agreement, made with one joint debtor, in no way prohibits suit upon the joint indebtedness; citing *Bank v. Lewis*, 8 Pick. 457; *Bank v. Willard*, 17 Pick. 150; *Gahn v. Niemcewicz*, 11 Wend. 312.

MORSE, J. Seligman sues upon a joint promissory note for $1,700, executed by the two Pinets and Shaw, dated July 3, 1888, and payable six months after date, to his order, at Seligman's Bank of Commerce, East Saginaw. Upon this note, before suit, one of the Pinets had paid two-thirds of the principal, and interest due at the time of payment.

The defense was that Seligman agreed with Shaw that he would collect two-thirds of the note of the Pinets,

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and extend the time of payment of the remaining third to Shaw until such time as certain profits from the barge Norway would be sufficient to pay such third. That in the fall of 1888 the defendants were the owners of said barge Norway. It was about to be sold by the United States marshal to satisfy a decree against it for certain claims upon the vessel. The defendant Alfred N. Pinet was absent in the Upper Peninsula. Adolph A. Pinet and Shaw were financially unable to redeem said barge from such sale, and the former was insolvent, which Seligman knew; and he was aware that he must look to Alfred N. Pinet and Shaw for the payment of this note, which he then held; that, before the sale of the barge, Seligman, at the request of Shaw, entered into a verbal contract with Shaw in which contract Shaw agreed to notify him when said barge was to be sold, and to buy it in for said Seligman, in consideration of which service Seligman agreed to purchase the said barge, and when said barge was purchased to give Shaw one-third of the net profits of the same, and, in the event of the sale of the Norway, Shaw was to receive one-third of the proceeds of such sale. The profits belonging to Shaw were to be applied on the note until it was paid, and time of payment extended until such profits should pay one-third of the same; that the remaining two-thirds should be collected of the Pinets. Seligman should have the right to retain said undivided one-third of the profits and proceeds of the Norway, and as fast as the same was received apply the same on the note. When such profits or proceeds paid one-third of the note Seligman was to surrender the note to Shaw, and pay to him his remaining interest, if any, in the profits and proceeds of the barge. There was no averment in the pleadings that the Pinets were parties to this agreement, or that, when they paid two-thirds of the note, they paid the same under or in

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view of such agreement. The defense was made in this suit by Shaw and Alfred N. Pinet, Adolph A. Pinet being defaulted for non-appearance.

It was shown on the part of the defense that Seligman suggested to Shaw that he should attend the sale, and bid the boat in as cheaply as possible, and in consideration for Shaw's services he should have a third interest in the barge. Shaw said to him that he would like "to have the boat put so it would pay for this note," and Seligman consented that Shaw should go down and bid the boat in, and pay him 7 per cent. interest on the note until it was paid; that Shaw should have time to take care of his share (one-third) of the note out of the earnings of the boat. In pursuance of this arrangement, Shaw went to Detroit and attended the sale, and at such sale Seligman bid the barge in for $1,525. After it was purchased Seligman said:

"The boat is mine; what do you want to do?" Shaw said: "Beggars shouldn't be choosers; I will leave it to you." Seligman then said: "You go on and run the boat; I haven't time to spend with it, and I don't want anything to do with it. You go on and run the boat, and do the best you can."

This was about September 22, 1888. Shaw took charge of the boat. He made one trip to Tawas, upon which no profits were made. He then took the barge to Saginaw, and ran it as a lighter, and turned the profits over to Seligman. The boat laid up for the winter, and in the spring Seligman refused to let him handle the boat any longer. Shaw could not swear that any net profits were made, but was told by Seligman's agent that the boat was in debt,—had not made anything as yet.

On cross-examination Shaw testified that the Pinets were not present when this agreement was made, and they were not parties to it, and that he had no agree-

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ment or arrangement with them about it; that he did not bid on the boat himself, as Seligman was present and did that for himself. There was no provision in the agreement as to what should be done in case the boat was lost or run behind, the expenses exceeding the profits.

Alfred N. Pinet testified that he went to Seligman's Bank, at East Saginaw, in December, 1888, or January, 1889, and paid two-thirds of this note to Mr. Emerick, who was the cashier or manager of the bank. He told Emerick that Shaw said if he (Pinet) would pay two-thirds Shaw would make the balance good. Emerick replied, "If Shaw said that, it is all right;" and received the money for two-thirds of the note. On cross-examination he testified that he went to see Shaw, and told him they ought to pay the note, and Shaw said that he had an arrangement with Seligman, as far as he was concerned, by which his part was paid, or just as good as paid. Shaw claimed to him that his third was to be paid from the net earnings of the Norway. Pinet did not pay the two-thirds because of any agreement with Seligman, as he had none with him, nor was there any bargain with Emerick that he should be released by such payment.

No testimony was offered by the plaintiff in rebuttal of the defendants' testimony, and the circuit judge directed a verdict for the plaintiff for the balance due on the face of the note, to wit, $586.06. The court was of the opinion that the agreement would not have the effect to extinguish the liability of the defendants. The note being joint, the liability was joint, and—

"Each one was answerable for the whole of the note, and nothing short of an absolute release of one of the parties to the note could have the effect to discharge the entire joint obligation of all the parties."

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The judge thought that if the agreement on the part of Seligman was not carried out, and the proceeds applied, in the way indicated by the agreement, upon the note, Shaw might have an action against him for breach of the agreement, but the agreement was not one that Pinet could avail himself of as a defense to the note.

The counsel for plaintiff, to support this judgment, maintain that in *assumpsit* against joint debtors it is no defense that one of them has been discharged from *his share* of the debt by an unsealed instrument in writing, or by an oral agreement, although such contract or agreement is founded upon a sufficient consideration; citing *McAllester v. Sprague,* 34 Me. 296; *Drinkwater v. Jordan,* 46 Id. 432; *Matthey v. Gally,* 4 Cal. 62; *Walker v. McCulloch,* 4 Greenl. 428; *Shed v. Pierce,* 17 Mass. 623. The doctrine of these cases is stated by Mr. Justice Heydenfeldt in *Matthey v. Gally, supra,* as follows:

"It is well settled that a covenant not to sue operates as a release, but the reason for it is only to avoid circuity of action. If the covenant not to sue be broken, the strict right of the covenantee is to recover on the covenant, and, as the recovery must be the same in both suits, the doctrine of release is resorted to to avoid circuity. But this doctrine, being technical, cannot be extended in its construction; and where the debt is joint, and the covenant not to sue is made to a portion only of the debtors, it will not be held as a release of either, but the party who holds the covenant must be left to his action upon it."

See, also, Leake, Cont. 928; 1 Pars. Cont. 28.

But I think these authorities have no application to the case made by the defendants here. And this Court has held that, in the case of a sole debtor, an agreement not to sue is not an independent or collateral undertaking, but goes directly to destroy or modify the original contract, and can be pleaded in bar for that reason, and not on the ground of avoiding circuity of action. *Robinson*

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v. Godfrey, 2 Mich. 408; *Morgan v. Butterfield*, 3 Id. 615.

It may be true that the arrangement between Seligman and Shaw did not amount to anything more than an agreement not to sue Shaw for his liability on the note, and that it was not the intention of Seligman to release the Pinets, as he was to collect the two-thirds of them. But the intention manifestly was that Seligman should look to the Pinets for two-thirds and to Shaw for one-third. The Pinets have paid their two-thirds, and now the case stands like this: Seligman is suing the Pinets and Shaw jointly for the recovery of the one-third of the note which he had agreed with Shaw he would not sue, but which might be paid out of the profits of the Norway. I cannot agree to any rule of law which will permit Seligman to collect out of the Pinets, after he has received two-thirds from them, this one-third which he has solemnly agreed with Shaw to wait upon him for. If there was a valid consideration for his agreement, as I think there was, and Shaw was the sole debtor upon this one-third, the authorities cited by plaintiff hold that he could plead it in bar of this suit, and that, if Seligman recovers in this action, because the debt is a joint one, Shaw then has an action for the damage occasioned him upon this agreement against Seligman. Seligman agreed to release Shaw from two-thirds of the debt, and to give him an opportunity to pay the other third outside of the Pinets. There is now no debt remaining on the note except this one-third, which Seligman has agreed with Shaw shall be paid in a particular way, an agreement for a breach of which Shaw can recover damages. Why, then, pursue this old idea, and hold that the Pinets and Shaw must submit to a judgment against all of them jointly in this suit? For the result in such case will be that, if the Pinets are forced to pay it, they can sue Shaw for contribution, and, after he has paid it back to the Pinets

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(for they have already paid their share), then Shaw can sue Seligman upon his agreement not to sue and recover his damages. Why not avoid at once this circuity of action, and hold Seligman to his agreement with Shaw, which, if kept, would relieve the Pinets from any further payment on the note, and Shaw from any liability, except such as arises under the new agreement?

If the Pinets had not paid the balance of the note,—the two-thirds,—then there might be some sense in applying the rule invoked by plaintiff's counsel, and shown in the authorities above cited, although we do not wish to say that we would apply it even in that case. But the case here is simply whether Seligman shall be held in law to carry out his agreement with Shaw, or whether he shall be permitted, in effect, to violate it, and to recover in this suit what he has agreed he would not collect in this way, and leave Shaw and the Pinets to right the wrong in some other action The intention of the parties, if known, ought to have effect, without any technicality of form or pleading standing in the way. The same authorities cited by counsel for plaintiff that go so far as to hold that a release of one joint debtor cannot be pleaded in bar for the others or for himself, in an action to recover upon the joint debt, yet hold that if the release is under seal it will discharge all the joint debtors. But under our laws to-day I think a discharge or acquittance of a debt is just as good without a seal as with it. See *Milliken v. Brown*, 1 Rawle, 398.

The intention of the contract between Seligman and Shaw, as shown in this record, was that two-thirds, and that only, should be collected of the Pinets, and that the the other third should be paid by Shaw as heretofore stated. If the authorities cited by plaintiff's counsel, and referred to above, are followed, the intent of this contract between Seligman and Shaw is disregarded and violated.

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There is no reason for doing so, except a technical one, which should have no force in this day and age. The Pinets, on the showing made upon the trial of this case, were discharged when they paid two-thirds of the note in suit, and Shaw, who is holden on the other third, is entitled to pay it according to the new agreement.

The judgment below must be reversed, and a new trial granted, with costs to defendants.

SHERWOOD, C. J., CAMPBELL and LONG, JJ., concurred. CHAMPLIN, J., did not sit.

ADDIE L. KEAM v. CALISTA CONKWRIGHT ET AL.

Judgment creditor's bill—Mortgage—Fraudulent transfer—Husband and wife.

1. Complainant filed a creditors' bill to subject a mortgage, originally executed to defendant Levi Conkwright to secure part of the purchase price agreed to be paid on the sale of 80 acres of land owned by him, and which, after delivery, was changed so as to make defendant Calista Conkwright the mortgagee, to the satisfaction of a judgment in favor of complainant and against Levi Conkwright; and, on a review of the testimony, the Court find that such change was made with intent to defraud complainant, and affirm the decree below granting the relief prayed for.
2. The voluntary assignment of a mortgage to the mortgagee's wife, by substituting her name as mortgagee after the instrument has become operative by delivery, and without consideration, will not prevent the subjection of the mortgage to the equitable remedies of a judgment creditor of the husband, in order to apply it in satisfaction of the judgment.
3. Where land, paid for by a wife, is by mistake conveyed to the husband, and the wife sells the land as her own, and informs the purchaser that she is the owner, and both understand that

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a purchase price mortgage shall be drawn in her favor, which, by a mistake of the scrivener, is drawn in favor of the husband, the correction of said mistake, after the delivery of the mortgage, by the consent of the mortgagor, by substituting the name of the wife as mortgagee, cannot be claimed to be in fraud of the husband's creditors, and need not be supported by a new consideration.

Appeal from Newaygo. (Palmer, J.) Argued October 22 and 23, 1889. Decided November 15, 1889.

Judgment creditor's bill. Defendant Calista Conkwright appeals. Affirmed. The facts are stated in the opinion.

Fred A. Mann, for complainant.

Andrew Hanson and *Dumon & Cogger,* for appellant.

CHAMPLIN, J. Levi Conkwright being indebted to Addie L. Keam upon a judgment rendered before a justice of the peace on September 16, 1885, for $136.53, and finding no goods or chattels to satisfy the same, a transcript was filed with the county clerk of Newaygo county on January 31, 1888. An execution was issued returnable February 21, 1888, at which time it was returned unsatisfied. Complainant then filed a judgment creditor's bill to reach equitable interests and things in action, and, after making the general charges usual in such bills, on belief charged that since the existence of her judgment the defendant therein was the owner in fee of a certain 80 acres of land, describing it, of the value of $1,200, and that on March 17, 1887, he conveyed the same by warranty deed to John Shaw, who as part payment therefor executed a mortgage back to said Levi Conkwright for the sum of $675, with interest at 6 per cent., payable as follows: One hundred and seventy-five dollars and interest, February 1, 1888, and the balance in annual

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installments of $100, the interest to begin February 1, 1891; that, after the execution and delivery of such mortgage, the said Levi Conkwright and Calista Conkwright, his wife, without consideration to support the same, and for the sole purpose of defrauding the creditors of said Levi Conkwright, and in particular said complainant of her judgment, erased the name of Levi Conkwright in said mortgage, and inserted in the place thereof the name of Calista Conkwright, with the knowledge and consent of said John Shaw.

The only controversy is over this mortgage. The bill was taken as confessed by Shaw. It called for an answer under oath, and Levi and Calista Conkwright filed a joint and several answer. Levi answers admitting the judgment and the indebtedness to Mrs. Keam, but denies having any property, equitable interests, etc. They jointly answer as to the mortgage in controversy as follows:

"That on or about May 1, 1881, the said Calista Conkwright was possessed of the sum of $200; that on or about that day she arranged to purchase the piece of land described in complainant's bill of complaint at the price or sum of $240,—$50 down, and the balance in installments of $50 per annum; that the whole sum of said $240 was paid by the said Calista Conkwright out of moneys belonging to her and earned by her; that the conveyance was by mistake drawn to run to Levi Conkwright instead of to Calista Conkwright; that the deed of conveyance was always in her possession, who thought that was sufficient security for her, and was never in the possession or control of Levi Conkwright.

"That in the beginning of the month of March, 1887, the said Calista Conkwright agreed to sell the land to John Shaw, and then told him that, although the same stood in the name of the said Levi Conkwright, it belonged to said Calista Conkwright. That on March 17, 1887, the defendant Levi, at the request of said Calista, executed a deed of conveyance of the said land to the said John Shaw; that on the same day a mortgage of the said land was executed by the said John Shaw in favor

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of the said Levi Conkwright; that this mortgage was given in favor of the said Levi Conkwright by a mistake, as it was understood by the said John Shaw and Calista Conkwright that the same should be given in favor of Calista Conkwright; that the mistake was made by James Barton, of the township of Big Prairie, county of Newaygo, who drew the deeds, and took the acknowledgment of the mortgage and conveyance.

"That on March 18, 1887, the said Calista Conkwright, having found that a mistake had been made by the said James Barton, went with the said Levi Conkwright to the said James Barton, and informed him of the mistake he had made; that the said James Barton told the said Calista Conkwright that he would not alter the mortgage, but that if she went and saw John Shaw she could alter it in his presence and with his consent; that the said Levi Conkwright and Calista Conkwright saw the said John Shaw, and with his assistance, and by his consent, substituted the name of Calista Conkwright; that this alteration was not done for the purpose of defeating the claims of any creditor of the said Levi Conkwright; and particularly it was not done for the purpose of delaying, defeating, or defrauding the complainant herein, as the said Calista Conkwright did not know that a judgment had been obtained by the said Addie L. Keam against the said Levi Conkwright; that the whole of the money paid for the purchase of the land belonged to the said Calista Conkwright, and that the taxes on the said land were always paid by the said Calista Conkwright."

This answer was filed under oath, and replication was thereto made and proofs taken. Upon hearing, the court below decreed in favor of complainant, and the defendant Calista Conkwright alone appealed.

To substantiate the charges made in her bill, the complainant introduced a deed in evidence bearing date May 15, 1885, wherein the West Michigan Lumber Company conveyed the premises in question to Levi Conkwright for the consideration of $240. This deed was acknowledged on May 19, 1885, and recorded on November 18, 1885. She also introduced in evidence a warranty deed bearing date March 17, 1887, from Levi Conkwright and Calista,

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his wife, to John Shaw, for the consideration of $1,000. This was recorded on March 18, 1888. She further proved by John Shaw that Conkwright told him that he owned the 80 acres, and wanted to sell it to him, and that he afterwards purchased it of Levi Conkwright for $1,000; that he paid him $25 cash, assumed a mortgage already upon the premises for $300, and secured the balance of the purchase money by a mortgage upon the land purchased for $675, running to Levi Conkwright; that Calista Conkwright never had any talk with him in regard to the sale of the place, and never claimed to own it, or any interest in it; that the deed and mortgage were drawn by Judge Barton, at his house; that Calista was there, and executed the deed, and she made no request that the mortgage should be made to her, and said nothing about the land belonging to her.

That about a week or ten days after the mortgage was executed Mr. Conkwright asked him if he would have any objection to fixing the mortgage over to his wife, and he told him he would not; and so he went at it, and scratched out the name of "Levi," and inserted in place thereof "Calista." She was present, and Shaw has no knowledge of Mrs. Conkwright paying Levi anything for inserting her name in the mortgage.

"He said he wanted to cut off his heirs and assigns, and put her heirs and her assigns on."

The mortgage was not again acknowledged after the alteration, nor is there any testimony showing that it was after such alteration delivered to Calista Conkwright with intent to operate as a mortgage to her. She testified that she caused it to be recorded.

It appears from the testimony of Levi Conkwright that at the time the change was made in the name of the mortgagee he knew from what outsiders told him that the judgment had been rendered against him by the

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justice. Mrs. Conkwright testified that she had no knowledge of the judgment, or of any indebtedness of her husband to Mrs. Keam. There is no testimony in the case showing that Mr. Conkwright had any other debts than this judgment, nor any other creditor than Mrs. Keam, at the time the alteration was made in the mortgage, nor, indeed, at any other time.

Upon the case so far made by the complainant, it may be said that it was made to appear that, at the time of the sale to Shaw, Levi Conkwright was the owner in fee of this land, worth $1,000; that he sold and conveyed the same to Shaw, and received back, as a part of the consideration, a mortgage for $675; that he was indebted to complainant, and caused an alteration to be made in the mortgage after it had become effective by delivery, the effect of which was, if valid in the manner it was made, to place the apparent ownership of such mortgage in his wife, Calista Conkwright, as fully as if he had assigned it to her in the ordinary method; that such assignment was voluntary, and without consideration. Under such circumstances, it would be subject to Mrs. Keam's equitable remedies, in order to apply it in satisfaction of her debt against Levi Conkwright.

To meet this case made by complainant, the defendants in their answer say that Calista bought and paid for the land conveyed by the West Michigan Lumber Company to Levi Conkwright, and that such deed to him was made by mistake to Levi, and should have been made to her; that she sold it as her own land to Shaw, whom she informed that she was the owner; and that it was understood by Shaw and herself that the mortgage should be drawn in her favor, but, by mistake made by James Barton, it was drawn to Levi, and the alteration was merely to correct such mistake.

If this theory and statement of facts is true, then

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no fraud was or could have been perpetrated to the injury of Levi's creditors, and no consideration was necessary to have passed at the time the mistake was corrected. But the defendants have placed witnesses upon the stand whose testimony shows conclusively that there was no mistake in drafting the papers made by Barton, and Shaw denies that there was any such understanding.

Calista Conkwright testified in her own behalf, and said that she earned the money that was paid for the land, and the contract was made to him (Levi) because she hated to go where the men were to pay for it, so she thought it would be just as well for him to do it for her as for her to go and do it herself; that she earned $100 of Hays by cooking that went to pay for this place and clear it. The defendants also introduced as a witness John Bullman, who testified that he was present when the bargain was made for the purchase of the land from the West Michigan Lumber Company in the spring of 1881; that he made the bargain himself; that the contract in the first place was to be drawn to him, and was to be transferred to Levi Conkwright; that the payment was made by the difference in a yoke of cattle belonging to Calista Conkwright, and the deed, when given, was to run to Calista Conkwright, through the team being her own; that Calista gave as her reason for wanting the contract in his name instead of hers that she was sick during the time, and was not able to go down there herself, and left it for witness to attend to. Her counsel asked the witness the following question, to which he answered:

"*Q.* What I meant was the reason why the contract should run to Levi, and not to her.

"*A.* Yes, sir; it was through her being sick, and not being able to go down there."

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This testimony does not accord with her testimony nor her answer, either in the manner the land was paid for, or the reason why the contract was made out to Levi as purchaser. Mrs. Conkwright also testified that she let her husband have the money she had earned in cooking for different lumbermen, from time to time, without taking his note, and also $450 pension money which she received for her first husband. It appears that this pension money was the first money she let him have, about 1880. This money he invested in a team of horses. It also appears from her testimony that he had paid her money from time to time upon these loans, but the amount neither he nor she is able to state. He never kept any account of the money borrowed nor the money paid, and she renders no account of the same. Levi Conkwright also testifies to borrowing money from time to time from his wife, and to paying her back at different times, from $5 to $50 at a time. He says that he and his wife had a "reckoning up" after the sale to Shaw, and before the papers were drawn, and found that he owed her a balance of $1,200, or about that, and he was asked by his counsel:

"*Q.* How did you arrive at this settlement?

"*A.* In this way: She was talking about selling, and I was owing her more than the place would amount to, and she told me that if I would have the mortgage run to her she would cancel our debt. That would be giving me over two hundred dollars, and I done it."

Later on he testified that they—

"Jumped accounts. I owed her at that time, I suppose, $1,200, but she called that all square.

"*Q.* On this settlement did you refer to any memorandum of account between yourself and wife?

"*A.* No, sir.

"*Q.* Were there any memorandums produced on that settlement?

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"*A.* I had none."

It does not appear that either had any, and yet they settled an account that had been running over eight years, consisting of money borrowed in small amounts, and money paid from time to time, by "jumping accounts," and agreeing upon about $1,200 as the amount he owed her. She fixes the amount at $1,250. They both agree that he was to pay this debt out of the sale of the land to Shaw. And she testifies repeatedly that she credited Levi $675 on what he owed her, and that she received and gave him credit for the $25 paid down, and that the $300, being the first mortgage, was money which they had borrowed to enable George Conkwright to purchase a piece of land, and he was to pay her that sum.

The defense in this case will not bear investigation. If it be true that Mrs. Conkwright bought and paid the West Michigan Lumber Company for this land, it was, on the theory of the answer, hers, and the consideration received or agreed to be paid for it on the sale to Shaw was hers. Why, then, should she, on receiving payment from Shaw on a sale of her own property, credit it on a debt due to her from her husband? If the transaction was a real one, it was a very easy way for Levi to pay an indebtedness to his wife with her own property. Had the claim been that he purchased the land from the West Michigan Lumber Company, and paid for it with money which he had borrowed of his wife or otherwise, and took this method of paying her, it would have been more plausible. But such is not the defense set up. I am satisfied from the testimony that the land was purchased from the West Michigan Lumber Company by Levi Conkwright; that it was conveyed to him in pursuance of such purchase; that he was the real owner of it, and sold it to Shaw, and

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received the mortgage back in accordance with the understanding of the parties at the time; that such mortgage was his in fact, and through no mistake; that Levi did not owe his wife $1,200 or any other considerable sum; and I am not satisfied that he owed her anything at the time of the alteration, which appears to me to have been an after-thought. I also am of the opinion that the conveyance of the mortgage from Levi to his wife was voluntary, and that it must be subjected to the payment of complainant's judgment.

The decree will be affirmed, with costs.

The other Justices concurred.

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THE UNITED STATES ELECTRIC FIRE-ALARM COMPANY v. THE CITY OF BIG RAPIDS.

Construction of contract—Sale of apparatus, etc., to be accepted if satisfactory—Cities and villages—Authority of alderman to waive provision of contract.

Plaintiff made a written proposition to furnish defendant a fire-alarm bell, etc., in which it was stipulated that defendant should thoroughly test the working of the same within 30 days after the completion of the work, and, if found to be satisfactory, and according to contract, accept and pay for the same. A contract was thereafter made between the parties, of which the proposition was made a part, which provided that the defendant should have 30 days after the completion of the contract to test the bell and the working apparatus, and in case the same was satisfactory, as per contract, should pay for the same. The work was performed, and tested, and rejected by the defendant's common council, and in a suit upon the contract to recover the contract price it is held that the provision in the contract as to testing the work does not change the import of the like clause in the proposition, but that they must

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be construed together, and that their reasonable construction is that the defendant was not obliged to accept and pay for said fire-alarm unless it was satisfactory to its common council, when tested.

Error to Mecosta. (Palmer, J.) Argued October 23, 1889. Decided November 15, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

M. Brown and *Austin Herrick,* for appellant, contended:

1. It would be extremely unjust to the plaintiff to place a construction upon this agreement that would prevent it from recovering, when it has performed completely upon its part. It will be remembered that the defendant has never claimed that the plaintiff has not done as it agreed to do in the premises. It simply claims that it has a right to say that the works put in by the plaintiff are not satisfactory to it. The law upon this subject is stated in *Machine Co. v. Smith,* 50 Mich. 569, where the Court cite and adopt as the law applicable to this class of cases: *Daggett v. Johnson,* 49 Vt. 345; *Hartford Mfg. Co. v. Brush,* 43 Id. 528.

Frank Dumon, for defendant, contended:

1. Where a party fails to do what he contracts to do he cannot recover on his contract, whatever his intentions may have been; citing *Wildey v. School-dist.,* 25 Mich. 419; *Martus v. Houck,* 39 Id. 431; *Smith v. Brady,* 17 N. Y. 173.
2. The fact that bells of the weight of the one in question are not manufactured of the tone mentioned in the agreement is not material; nor is it material that neither party knew of this fact at the time the agreement was made. If a party binds himself to do that which may be deemed within the range of possibility, but which has never yet been done, and is not even known to be possible, he will be responsible in damages if he fails to perform his agreement; citing 3 Am. & Eng. Encycl. Law, 897; 2 Pars. Cont. (5th ed.) 673.
3. The consent of Alderman Comstock to a change in the contract, as to the tone of the bell, cannot aid plaintiff; no officer had any authority to change the provisions unless expressly authorized by the common council, which authority was never

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given; citing *Bonesteel v. New York*, 22 N. Y. 162; *Hague v. Philadelphia*, 48 Penn. St. 527.

4. This case falls within that class where the right is reserved to the purchaser to determine whether he will accept and pay for the property, after he has seen it, and put it to a practical test; citing *Machine Co. v. Smith*, 50 Mich. 566; *Cole v. Homer*, 53 Id. 438; *Machine Works v. Lowell*, 62 Id. 546; *Mfg. Co. v. Ellis*, 68 Id. 101.

CHAMPLIN, J. This cause was tried before the court without a jury, who, on request of the parties, made a finding of facts and law, from which it appears that the city of Big Rapids has a volunteer fire department, consisting of six fire companies,—five hose companies, and one hook and ladder company,—and that the firemen who compose the various companies reside within a radius of three-fourths of a mile from the court-house in said city.

On June 6, 1887, the common council of the city of Big Rapids appointed a committee of five members of the council to consider the various propositions for a fire-alarm submitted to it, and those which should be submitted to them thereafter. On June 24, 1887, the United States Electric Fire-alarm Company of Evart, Michigan, submitted to said committee the following proposition in writing:

"OFFICE OF
UNITED STATES ELECTRIC FIRE-ALARM CO.
EVART, MICHIGAN, June 24, 1887.

"ALDERMAN COMSTOCK,
"Chairman Fire-alarm Committee,
"Big Rapids, Mich.

"*Dear Sir:* In case it is decided to use the court-house tower instead of building a bell tower, we will furnish the following proposition to erect a large fire-alarm bell, tower bell striker, alarm circuit, etc., as follows:

"One 3,000-pound bell and hangers, one medium sized tower bell striker for electrically striking the alarm and location of fires on the bell, and to be operated and con-

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trolled from the water-works pump house; the bell and striker to be placed in the court-house tower, and one manual repeater located at the water-works pump house for automatically operating the tower bell striker, and capable of repeating the number of any one of 30 different fire-alarm boxes, as may be desired, together with all the poles, wires, insulators, brackets, battery, etc., necessary for constructing line and electrical alarm circuit, connecting repeater at water-works with tower bell striker in the tower; said poles to be good sound cedar, of sufficient length to carry the line over all other electrical wires now erected; the line to be of the very best quality of No. 12 galvanized telegraph wire, well insulated on good glass insulators, secured to the poles, and all joints well soldered; also all the necessary battery and minor attachments for the successful operation of the same,—all complete and ready for service for the sum of $1,248. It being indefinite as to the actual weight of a bell, although intended to be cast of a given weight, it is proposed to make an addition or reduction in the price given at the rate of 16½ cents per pound, according to the variation of the weight of the bell from the proposed weight.

"The company agrees to do all of the above work, and complete the contract in about 30 days from the date of signing the contract, and your honorable body shall thoroughly test the working of the same within 30 days after the completion of said work, and if found to be satisfactory, and according to contract, accept and pay for same.

"In case the manual repeater is left from the list of apparatus and a signal key used, the above figures will be reduced to $1,148.

"It is further proposed that in case a 2,500-pound bell is used the above figures will be reduced to $1,063. The bell foundry guarantee all bells, and we guarantee all of our machinery as to perfection of operation, and against breakage caused by flaws or defects in castings.

"All of which is respectfully submitted.

"UNITED STATES ELECTRIC FIRE-ALARM CO.,
"S. A. Chase, Sec'y."

Alderman Comstock, one of the committee, afterwards reported to a meeting of the common council on July 5, 1887, that the committee had negotiated for a fire-alarm

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with a 3,000-pound bell, and asked the council to settle on some location for it to be placed. Such report was received and the committee discharged, and the following record thereof was entered upon the journal of the common council, to wit:

"Alderman Comstock, chairman of the special committee appointed to purchase a fire-alarm, reported that they had negotiated for an alarm with a 3,000-pound bell, and asked the council to settle upon some location for it to be placed. Report adopted, and committee discharged."

On July 23, 1887, the city of Big Rapids entered into a contract in writing with the plaintiff in this suit, which said contract was signed by the mayor in behalf of the city, and by the United States Electric Fire-alarm Company, by S. A. Chase, its secretary. The aforesaid proposition made by the United States Electric Fire-alarm Company was attached to said written contract, and became and was a part thereof, and in addition thereto the contract contained the following, that is to say:

"It is hereby agreed between the city of Big Rapids of the one part, and the United States Electric Fire-alarm Company of the other part, as follows:

"The said second party hereby agrees to put in a fire-alarm bell in court-house tower, to do all work and furnish all material and things used in connection therewith, as specified in specifications hereto attached, consisting of four sheets; and same are declared to be and are a part of this contract.

"Said second party agrees to set poles at such distance apart as to support wire in a good and substantial manner, and to set same of sufficient depth to stand in proper manner; poles to be set in streets and alleys to points hereinafter named at intersection of Grand Traverse and Warren avenue, unless permission is granted to set them on private property, or to cross same with wire. One pole to be set at intersection of Grand Traverse street with Warren avenue; thence along Warren avenue

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to Hemlock street; thence along Hemlock street to River street; thence along River street to Maple street; thence across Maple street to alley between Stewart and Ives avenue; thence southerly along to Elm street; thence to court-house tower.

"All work to be done in a good and workman-like manner, and work done and contract to be performed within 40 days from the date hereof. The tone of bell to be second A below middle C on the organ. Said first party to have 30 days after contract is completed to test bell and working apparatus, and, in case same is satisfactory as per contract, then they agree to pay said second party the sum of $1,248 therefor, or as per specifications as to weight, &c. Said first party agrees to furnish and put in ceiling and floor in tower."

In pursuance of said contract plaintiff put in for the defendant a fire-alarm, including a bell weighing 3,206 pounds, and the total amount of the plaintiff's demand against the city for the fire-alarm system, including the bell, is $1,294.99. The bell was put in the court-house tower, and the tone of the bell is about E flat.

On September 24, 1887, plaintiff notified the common council that the system put in by it was complete, and requested the council to fix a time when they would test the same, and the council fixed October 1, 1887, at 9:30 o'clock A. M. as the time when such test would be made. The common council assembled accordingly for the purpose of testing the fire-alarm, and the plaintiff, by its secretary, S. A. Chase, made a thorough test of the working of said fire-alarm system, and the tone and volume of sound of said fire-alarm bell then in the court-house tower. The members of the council also tested the tone and volume of the bell from the different fire-alarm boxes. Another test of the fire-alarm was afterwards made in the night-time, by turning in an alarm from one of the boxes, said council being then in session in their council chamber, and listening thereto. A still

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further test was made on October 9, 1887, it being on the occasion of a fire in the city.

On October 10, 1887, the council considered the question whether the said fire-alarm system and said fire-alarm bell were satisfactory to said common council, and whether said common council should accept and pay for the same, and took action thereon, and then and there considered that said fire-alarm system and bell were not satisfactory to said common council, and they refused to accept the same, or any part thereof, for and in behalf of the city, and they then and there caused a record of their determination to not accept the same, and directed the recorder of the city to notify the plaintiff of such action. The recorder sent to the plaintiff by mail the notice following:

"BIG RAPIDS, October 13, 1887.

"ELECTRIC FIRE-ALARM CO.,

"Evart, Mich.

"*Gentlemen:* At a meeting of the common council last Monday night they rejected the fire-alarm bell as not satisfactory. Yours, etc.,

"S. A. STAMBAUGH, Recorder."

The notice was received by the secretary of the company on October 15, 1887, at Evart, Michigan, and on the seventeenth of the same month the common council adopted the following resolution:

"Whereas, the city of Big Rapids has made a contract with the Electric Fire-alarm Company of Evart, Michigan, the condition of such contract being that said fire-alarm company furnish a bell weighing 3,000 pounds, and all apparatus for striking the same, material and work to be satisfactory to the city: *Therefore, resolved,* by the common council of the city of Big Rapids, that the tests of the same have not been satisfactory; and it is further *resolved* that we do not accept the same, as it is not satisfactory according to contract."

The common council of the city has never in fact

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accepted said fire-alarm system, and said fire-alarm bell which is a part thereof, and the city has not used the same for any purpose whatever. The fire-alarm bell is not suitable for the purpose of a fire-alarm for the reason that its tone and volume of sound is such that said bell cannot be heard easily by the firemen when within their houses or places of business, or when engaged in anything demanding their attention in any part of the city.

The court further found that the bell put up by the plaintiff was the exact kind of a bell contracted for by the defendant, except as to the tone thereof; that the fire-alarm system furnished by the plaintiff for the defendant, and all work done by it in putting up said fire-alarm system, and the materials furnished therefor, were furnished and done in accordance with the terms of said agreement, except the tone of the bell, which was about E flat, instead of second A below the middle C on the organ; that defendant never objected to the bell on account of the difference in tone; that the bell was properly manufactured, was of the best bell metal, had been properly tested by competent experts before it was put up by the plaintiff, and was in every respect a first-class bell; that bells of the weight of the one in question are not manufactured of the tone mentioned in said agreement, but neither one of the parties knew this fact at the time said agreement was made; that as soon as the plaintiff found it out he notified said C. W. Comstock, who was the chairman of the committee on water-works of the common council, which said committee had in charge the matter of said fire-alarm system, and who, upon receiving said notice, notified the plaintiff to do the best it could in regard to the tone of the bell, which it did.

The circuit judge also found that the common council, acting in good faith, made a thorough and fair test of the working of said fire-alarm, and that they refused to

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accept the same in behalf of the city in good faith, and for the reason that the same was not suited to the needs of the city, and was of no practical utility as a fire-alarm. He also found that the agreement above set out was the only agreement between the parties in respect to the premises.

As a conclusion of law he found that the plaintiff had not made out by its proofs such a case as would entitle it to a judgment in any amount whatever against the defendant.

The plaintiff failed to show a substantial compliance with that portion of the contract which stipulated that the tone of the bell should be second A below middle C on the organ. We do not think that the defendant waived this provision of the agreement by the fact that bells of 3,000 pounds' weight are not manufactured having such tone, and that Mr. Comstock, when notified of that fact, told plaintiff to do the best he could with regard to the tone of the bell. The fact is not found that Mr. Comstock had any authority to make any changes in the contract, and the records of the proceedings show that when the committee reported the proposition made by plaintiff to the common council they were discharged.

Counsel for plaintiff make no claim in this case under the common counts in *assumpsit*. They claim to recover upon the sole ground that the difference in the tone of the bell was waived, and that in all other respects plaintiff has fully performed its contract, and the defendant has refused to accept, and pay the contract price. While admitting that the rights of the parties depend upon the construction of the contract, they insist that the defendant did not have the arbitrary power to refuse to accept the work done, and materials furnished, notwithstanding the plaintiff had performed in every particular; that, if

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the plaintiff performed the agreement on its part, the defendant was bound to accept and pay. They admit that the defendant had the right to test the property for the purpose of ascertaining whether it was according to contract, and if it was it was bound to be satisfied, and was legally liable to pay the contract price.

The particular clauses of the contract to be construed read as follows:

"The company agrees to do all of the above work and complete the contract in about 30 days from the date of signing the contract, and your honorable body shall thoroughly test the working of the same within 30 days after the completion of said work, and, if found to be satisfactory, and according to contract, accept and pay for same."

This language is contained in the written proposition made by the plaintiff to defendant. The written contract executed by the parties contained this clause, namely:

"Said first party to have 30 days after contract is completed to test bell and working apparatus, and in case same is satisfactory, as per contract, then they agree to pay," etc.

The proposition of the plaintiff was attached to and made a part of the contract between the parties, and consequently these clauses must be construed together. The language employed by the plaintiff in making the proposition clearly indicates that the council was not obliged to accept unless the work was done according to contract, and was also satisfactory, and this is a reasonable construction of the contract. The council were acting in a representative capacity, and in the interest of the public. The contract involved a change in their system, and was to them in the nature of an experiment. What they required was efficiency in the system which they were about to adopt, which, while it might operate well under a paid fire department, should be adapted to

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the workings of a volunteer fire department, the members of which are in general following their usual avocations, and volunteer their services upon an alarm of fire. It would appear that the alarm should be such that the members would hear it while about their business in their shops and counting rooms, as well as when in their houses at night.

The council had a right, not only to test the workings of the system to ascertain whether it was according to contract, but to satisfy themselves if the system furnished an alarm sufficient for the purpose for which they designed to employ it. The clause last cited from the written contract does not change the import of the clause above quoted from the plaintiff's proposition. They must be construed together, and the reasonable construction of them is that the city of Big Rapids was not obliged to accept and pay for the fire-alarm furnished by the plaintiff, unless it was satisfactory to its common council when tested. *Walter A. Wood, etc., Machine Co. v. Smith*, 50 Mich. 565 (15 N. W. Rep. 906); *Mansfield Machine Works v. Lowell*, 62 Id. 546 (29 N. W. Rep. 105); *Plano Mfg. Co. v. Ellis*, 68 Id. 101 (35 N. W. Rep. 841).

The judgment of the circuit court is affirmed.

The other Justices concurred.

STELLA G. LEATON v. JOSEPH MURPHY AND DENNIS MURPHY.

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Township treasurer—Levy and sale under warrant.

The same rule must be applied to a sale by a town treasurer to satisfy a tax as to judicial sales.

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So *held*, where a treasurer seized two horses, not a matched team, and either of which animals was worth more than the amount of the tax, and sold them together, without offering them for sale separately.

Error to Isabella. (Hart, J.) Argued October 23, 1889. Decided November 15, 1889.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

F. C. Wallington, for appellant.

E. D. Wheaton and *W. S. Walker*, for defendants, contended:

1. It is the duty of the officer to sell the property in such lots or parcels as to command the highest price. He has a large discretion, and is not required to sell each particular article separately; citing *Perkins v. Spaulding*, 2 Mich. 161.

LONG, J. Replevin was brought to recover possession of two horses, which had been sold by the treasurer of the township of Deerfield, Isabella county, by virtue of a warrant annexed to the tax roll of that township for the year 1887. The proceedings under the writ of replevin are not questioned, and whatever irregularities may have existed in the tax roll need not be discussed.

It appears that one George Murphy was treasurer of the township during the year 1887, and, having the tax roll in his possession, with the warrant annexed, went to the premises where these horses were kept, levied upon and advertised them for sale for the payment of a tax assessed against Brown & Leaton for that year. The horses were kept at the farm of Brown & Leaton until the day of sale. On that day the treasurer, Mr. George Murphy, accompanied by his brother, Joseph Murphy, one of the defendants in this case, went to the place of sale. It appears that no other bidders were present, except Joseph

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Murphy, though the treasurer says he stopped along the way, and attempted to get other bidders to go out. It is also claimed that a man by the name of Harrington was there for a time, but that the tenant of Brown & Leaton there on the farm drove him away. Mr. Murphy, the treasurer, finally offered the two horses for sale together, and his brother, Joseph, bid them in for the amount of the tax.

On the trial of the case plaintiff's counsel requested the court to charge the jury—

"That it was the duty of the treasurer to have sold the horses separately, and his failure to do so makes the sale void, and plaintiff is entitled to a verdict."

This instruction the court refused. The jury returned a verdict in favor of defendants.

We think the court was in error. The treasurer had no right to offer and sell the horses together. It is not contended that they were a matched team, or that it was better for the interests of the parties to sell them together; or that they would bring a greater price in that manner of sale. Neither is any showing made that one of the horses would not have brought the amount of the tax. On the other hand, it appears from the appraisal, made under the writ of replevin, that either one of the horses was worth more than the amount of the tax demanded. The treasurer did not offer them separately, but gives as a reason that his brother, who was the only bidder there, would not bid upon them separately. It appears, however, that the treasurer and his brother had talked this matter over before reaching the place of sale, and Joseph stated he would buy the team for the tax, but he did not have sufficient money to do so. The treasurer, therefore, loaned him the money to make the purchase, or a portion of it.

Just what took place there on that day—the offering of

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the two horses together, and the sale together as one parcel—is sufficient to show the danger of a rule permitting a town treasurer, under his warrant, to sell in a lump for the payment of a tax. The same rule must be applied to such sales as to judicial sales.

The court was in error in refusing the instruction. The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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JENNIE J. MELLIS v. WILLIAM E. RACE, IMPLEADED WITH DERK SNELL.

Proceedings under void law.

This case is ruled by *Spry Lumber Co. v. Sault Savings Bank Loan & Trust Co.*, 77 Mich. 199, in which the mechanics' lien law of 1887 was held unconstitutional.

Error to Kent. (Judkins, J., presiding.) Argued October 24, 1889. Decided November 15, 1889.

Proceedings under mechanics' lien law of 1887. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Smedley v. Irwin, for appellant.

Nathan P. Allen, for defendant.

CAMPBELL, J. These are proceedings under the mechanics' lien law of 1887, and are brought by a person claiming to have furnished material to a contractor, for the

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purpose of holding the land built on for payment. The jury found against the plaintiff on the general merits, and she brings error on rulings.

It has already been held in *John Spry Lumber Co. v. Sault Savings Bank, etc., Co.*, 77 Mich. 199, that the entire law of 1887 is void on constitutional grounds, and that no proceedings can be had under it for any purpose, but that such valid legislation existing previous to the passage of the law remains unchanged by it.

It follows that the judgment below in favor of defendant should be affirmed, with costs.

The other Justices concurred.

WILLIAM W. TYLER v. THE BLODGETT & DAVIS LUMBER COMPANY.

Sawing contract—Lien upon products—Waiver.

A log-owner contracted with a mill-owner for sawing a quantity of logs, and sold 700,000 feet of the lumber, which was paid for, and piled by itself on the dock, and marked by the mill-owner with the initial letters of the vendee's name, who shipped 600,000 feet, and, at the close of the season's sawing, the vendor settled for the balance of the saw-bill by his note, which was accepted by the mill-owner, who is held by these acts to have waived any lien he had upon said lumber; and it is further held that he had no lien upon the lumber so sold for the entire season's sawing.

Error to Menominee. (Grant, J.) Argued November 1, 1889. Decided November 15, 1889.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

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Sawyer & Waite, for appellant, contended

1. The defendant had a right to the possession of the lumber replevied until its saw-bill was paid, unless the lien was discharged or abandoned by agreement, or implication; citing How. Stat. §§ 8399, 8400; and, if this case is not covered by the statute, the lien would attach at common law, of which the statute is declaratory; citing 1 Jones, Liens, § 749; and if such lien may be held against the owner, much more may it be so retained against his vendee, or an attaching creditor; citing Overton, Liens, 47; *Palmer v. Tucker*, 45 Me. 316.
2. If part of the lumber has been delivered to the owner and hauled away, the lien will attach to the part remaining in the possession of the creditor; which lien attaches to every piece as a charge generally for the whole work done; citing Overton, Liens, 48; *Partridge v. College*, 5 N. H. 286; *Mount v. Williams*, 11 Wend. 77; *McFarland v. Wheeler*, 26 Id. 467; *Pierce v. Sweet*, 33 Penn. St. 151; *Chadwick v. Broadwell*, 27 Mich. 13; 1 Jones, Liens, §§ 320, 739, 740, 1001.
3. An intention to waive a lien will not be presumed, in the absence of evidence clearly tending to show such intention; citing 1 Jones, Liens, § 999; *Muench v. Bank*, 11 Mo. App. 144; nor was the lien discharged because the agreement in regard to payment was inconsistent with the existence of a lien; citing *Chadwick v. Broadwell*, 27 Mich. 6, 11; 1 Jones, Liens, § 1002; *Cardinal v. Edwards*, 5 Nev. 36.

B. J. Brown, for plaintiff, contended for the doctrine stated in the opinion.

LONG, J. The facts in this case are stated in the charge of the court, and the ruling of the court upon such facts raises the only question for consideration. The court charged the jury as follows:

"This is an action of replevin, brought to recover the possession of manufactured lumber described in the declaration. It appears from the evidence in the case that one Baars, Jr., was the owner of a large lot of logs, which were transported to the mill belonging to the defendant, the Doherty & Baars Lumber Company; that the Doherty & Baars Lumber Company agreed to saw these logs up into lumber for Baars, Jr. It appears, furthermore, that this lumber was sold by Baars, Jr., to

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different parties; among them was the plaintiff in this case. It appears from the evidence—there is no dispute to the contrary—that one Mr. Smith, the witness in the case, made the bargain for Mr. Tyler with Baars, Jr., for the purchase of seven hundred thousand feet of this lumber. Mr. Smith remained there to see that the lumber was sawed according to his directions. The lumber was sawed; was piled upon the dock in one pile, evidently according to the estimate made of the amount; it was marked 'W. W. T.,' the initials of the plaintiff in this case. This was done by the defendant, through his agent. Six hundred thousand feet of the lumber was shipped. The other one hundred thousand feet was not shipped, but was left upon the docks. It remained there until the following spring.

"Meanwhile the other lumber of Baars had been sold by him to different parties, and had all been taken away from the possession of the Doherty & Baars Lumber Company. It appears that Baars did not pay the total amount that was due for sawing, but that at the end of the season there was due from him to the defendant something over nine hundred dollars. The defendant refused upon demand, to let this property be taken away, upon the ground that it had a lien upon the property for the sawbill of that season, or the balance due upon it, and that is the question to be decided in this case.

"It is, in my judgment, gentlemen, simply a question of law A bill was rendered by the Doherty & Baars Lumber Company to this J. F. Baars, Jr., dated September 3, 1887. It was a bill for the sawing for that season up to that time. Part of it, evidently, was according to the exact scale, as the lumber was measured when shipped. The balance of it was evidently upon its face, according to the mill scale. That bill shows that it was paid in this way: Received sixty-day note for amount, $3,041.61, which was the balance due upon the bill.

"Now, it is clear that the Doherty & Baars Lumber Company knew that this lumber belonged, or was to belong, to the plaintiff in this case when it was sawed. It was piled up there on the dock, with his mark upon it. The larger portion of it had been shipped. The defendant in the case then sawed up the balance of the Baars logs, and allowed all the rest of the season's cut to be shipped, without enforcing any lien upon the lumber

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so manufactured, and claims the right to hold the lumber previously manufactured and set apart there as Tyler's for the price of the sawing after that time.

"It seems to me, gentlemen, clearly, that this is not the law. The defendant or anybody sawing logs can very easily arrange with each of the parties to whom the lumber is shipped or sold for a settlement of the lien; and in my mind it would be unjust, and is not the law, that after this lumber had been set aside as the lumber of Tyler, and marked with his initials, that months afterwards this lumber could be held for a lien for the price of sawing done after that time. Clearly, by accepting the paper, it discharges the lien upon the property, in my judgment, and when a bill is made and receipted it discharges the lien upon the lumber manufactured up to that time. This is not a case where, as between the owner of the lumber and the mill-owner, there is a lien upon the whole season's cut; but it is a case where, with the knowledge of the defendant, this cut has been divided up into separate parcels, part sold to one, part to another. And I hold, gentlemen, that the defendant in the case had discharged its lien upon this lumber under the circumstances of this case, and charge you to find a verdict for the plaintiff, with nominal damages of six cents.

"*Mr. Sawyer.* Before the jury render their verdict, I think the court misunderstood or did not take notice of the whole evidence, and I wish to call the court's attention to it, as the court dwelt upon it in his charge, and that was that the lumber was marked 'W. W. T.' by defendant, or by their agent under their instructions. The evidence in that case was, by Mr. Smith, that lumber is so marked,—is marked for different parties,—for the purpose of identification, and to keep it separate from lumber sawed for other parties,—other people's lumber. It was so testified by Mr. Adams, that lumber is so marked. I merely call the court's attention to it. He says directions for marking it are given sometimes before it is sawed, so it can be marked for identification.

"*Court.* They must know, of course, that that lumber is intended eventually to belong to the party for whom it is marked. That being the case, I do not think it is the law that a mill-owner can let five of these parties,—supposing there were six of them,—let five take the lumber

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marked, and then hold a lien for the whole on the balance. It is very easy for the mill-owner to insist upon his lien upon all the parties, under those circumstances, in my judgment."

The only errors assigned are that the court erred in holding that the defendant discharged its lien under the circumstances, and that the court erred in admitting in evidence plaintiff's Exhibits A and B. Exhibit A is a statement of account rendered by defendant to J. F. Baars, Jr., showing a balance due on saw-bill of $3,041.61, and receipt for Mr. Baars' note at 60 days for such balance, and Exhibit B, a letter from the attorneys of the defendant to plaintiff, dated July 30, 1888, making claim to hold the unshipped lumber for the saw-bill, amounting to $971.27, with interest from October 1, 1887. There was no error in admitting these in evidence, and the court was not in error in holding that, under the facts shown, plaintiff was entitled to a verdict. The lumber was sawed and piled out in a separate pile by defendant for the plaintiff, and marked by defendant with plaintiff's initials. Plaintiff paid in full for the lumber to Baars, and it appears that defendant settled with Baars for the saw-bill by taking his note for the balance. If the defendant had a lien upon the lumber for its saw-bill, it must be held to have waived it, by piling this lumber apart, marking it with the initials of the plaintiff, and taking the note of Baars for its bill.

Plaintiff acted in good faith in the purchase, and paid in full for the lumber set apart for him. Under these circumstances, it cannot be held that defendant had a lien upon this portion for the sawing of the whole of the logs put into the mill by Baars. The defendant knew of and assented to the sale of the lumber to plaintiff when it set it apart and marked it to him. It was expected that it would all be shipped in the fall of 1887, and no

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objection was made to this shipment. Plaintiff lost no rights by leaving a portion of it over until the following March, and it was not until July following that defendant claimed any lien. We think the circuit court was correct in the charge that under the circumstances the plaintiff was entitled to the lumber.

The judgment must be affirmed, with costs.

The other Justices concurred.

The Gale Manufacturing Company v. Abram I. Phillips.

Mortgaged chattels—Replevin by mortgagee—Redelivery on payment of mortgage—Costs.

Plaintiff brought replevin in the circuit court for chattel-mortgaged property, and the writ was delivered to a constable, who removed the property from defendant's store to a building across the street, and, soon afterwards, at the request of the plaintiff, made a formal offer of redelivery of the goods to the defendant, *where stored*, at the same time tendering him the key to the building, which defendant refused to accept, or to have anything to do with the goods unless they were returned to his store. Thereupon the constable delivered the key to a deputy-sheriff, who took possession of the goods under the writ of replevin, which were appraised, and a bond was executed and delivered to the officer signed by sureties only, the penalty of which was less than the appraised value of the goods, after which the goods were delivered to the plaintiff, and were soon afterwards advertised for sale by the officer under the mortgage. On the day fixed for such sale the defendant (mortgagor) paid the full amount due on the mortgage, after which the plaintiff's agent tendered to the defendant the possession of the goods, *where stored*, which defendant declined to accept. Upon an assessment of damages, after a judgment of discontinuance in the replevin suit, the defendant was awarded the value

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of the property, which judgment is set aside with costs of both courts to the plaintiff; the Court holding that the plaintiff came lawfully into possession of the goods under its mortgage, which possession was not made wrongful by the payment of the mortgage, and that, while the defendant had the right, upon such payment, to a redelivery of the mortgaged property, he could not insist upon its being returned to his store by the plaintiff, but must take it where the plaintiff had stored it for safe-keeping.

Error to Berrien. (O'Hara, J.) Argued October 25, 1889. Decided November 15, 1889.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Edward Bacon, for appellant, contended:

1. The removal of the goods across the street, from defendant's store, was legal and justifiable by reason of the chattel mortgage; citing *Smith v. Judge*, 58 Mich. 560; and the writ of replevin had nothing to do with such removal, it being retained by plaintiff's agent, and never in the possession of the constable.
2. The payment by the defendant of the mortgage, with all costs, was an unconditional affirmance of the mortgage, and of the plaintiff's proceedings thereunder, and of its rights as mortgagee; citing 2 Greenl. Ev. § 600.
3. There was no replevin of any property if, on October 12, 1888, and before and after that date, it was in the plaintiff's possession in accordance with the provisions of the mortgage; citing *Bacon v. Davis*, 30 Mich. 157; *Hickey v. Hinsdale*, 12 Id. 102; and, if the property was not taken from the defendant's possession, he can have no judgment for its return or value; citing *Douglass v. Garrett*, 6 Wis. 49, and cases cited.

Clapp & Bridgman, for defendant, contended:

1. Plaintiff, by the writ of replevin, received defendant's goods from the sheriff and appropriated them. The writ was plaintiff's; it delivered it to the sheriff; and his return shows that he replevied the goods, and delivered them to the plaintiff. The constable had the key and the possession of the building, which he turned over to the sheriff.
2. The notice of assessment of damages was sufficient, and the assessment was parcel of a legal judgment against which no

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allegation is or could be legally assigned; it concluded the plaintiff; citing *Humphrey v. Bayn*, 45 Mich. 567; and on refusal to assess the damages on discontinuance, *mandamus* lies to compel such assessment; citing *Wheeler v. Wilkins*, 19 Mich. 81; *People v. Tripp*, 15 Id. 518; *Forbes v. Judge*, 28 Id. 497; *LaBarr v. Osborn*, 38 Id. 496.

3. The suit is to be determined upon the situation when the writ issued; citing *Belden v. Laing*, 8 Mich. 500; *Hickey v. Hinsdale*, 12 Id. 99; *Cary v. Hewitt*, 26 Id. 228; *Clark v. West*, 28 Id. 242; *Burt v. Burt*, 41 Id. 82.

LONG, J. This action of replevin was tried in the Berrien circuit court without a jury, and the court made the following findings of fact and conclusions of law:

"Defendant was the owner of a small stock of wood and iron goods in the village of Three Oaks, Berrien county, Michigan; the stock consisting principally of agricultural implements.

"Being indebted to the plaintiff in the sum of $246.99, he executed a chattel mortgage on his 'stock of goods, consisting of road scrapers, plows, spring-tooth harrows, pumps and tubing, binder twine, cultivators (one and two horse), 2 Gale hay-rakes, Gale sulky harrows and seeders, all plow points and plow repairs, stoves, and all shelf goods and grass seed sowers,' to secure the payment of such debt, with interest thereon at 8 per cent. per annum. This mortgage was executed on September 29, 1887, and the debt secured by it was made payable on or before October 1, 1888. About the time it became due, Mr. Gardner, plaintiff's attorney, called upon defendant, and demanded either the payment of the mortgage debt or additional security for the payment thereof; neither of which demands the defendant could comply with. He, however, professed a willingness to satisfy the plaintiff within a reasonable time, but at that time could do no more than to renew the mortgage. Mr. Gardner was not authorized to accept these terms, and so advised defendant; upon which Gardner returned to Albion, headquarters of plaintiff. Mr. Botsford was then sent to Three Oaks by plaintiff, with instructions to sue out a writ of replevin in case of failure to make collection of the debt or to procure additional security for its payment.

"Failing to either collect or to obtain the desired security, Botsford caused a writ of replevin to issue from

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this court on October 4, 1888, which writ, and the affidavit thereto annexed, were in due form, and in each of which Abram I. Phillips was designated as defendant and the Gale Manufacturing Company as plaintiff. This writ commanded the sheriff to take into his custody, not only the goods described in the mortgage, but 'all goods, stock, and merchandise in and upon said premises, or elsewhere in said county, belonging to said stock.'

"Botsford had been instructed by the plaintiff to place the writ in the hands of a proper officer for service; but, instead of handing it to the sheriff, he directed a constable of Three Oaks to seize the goods, he (Botsford) retaining the writ in his own possession.

"The constable, under the direction of Botsford, removed all of defendant's stock from the latter's store to a building across the street, owned by one Geminder, and an inventory was made by Botsford of all goods so removed at the time of their removal, viz., October 4 and 5, 1888. The key of the Geminder building was in the possession of the constable; and from the time of their removal the defendant had nothing to do with the possession of such goods, nor had he consented to their removal.

"On October 5, 1888, a loosely-drawn paper was executed by the plaintiff, which purported to be an indemnity bond, running to the constable; the penal sum of which was $200. In this alleged bond reference was made to a chattel mortgage, but in no part of it was reference had to a writ of replevin, or to a suit of any form. Upon learning of Botsford's mistake the plaintiff's attorney immediately wrote to the sheriff of this county, requesting him to go to Three Oaks without delay, and have the constable formally deliver the goods back to the defendant, and then to serve the writ himself. In this letter the attorney advised the sheriff that it was not necessary that the goods should be taken back to defendant's store, but that a formal delivery, as above indicated, would be sufficient for all purposes.

"Acting upon these instructions, Mr. Palmer, a deputy-sheriff of this county, proceeded to Three Oaks on October 12, 1888; saw the constable and Botsford, and, after explaining the situation to them, waited for the constable to make the delivery indicated. Thereupon the constable did offer to the defendant the key of the Geminder building; but defendant refused to take it, or to have

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anything to do with the goods unless they were returned to his store. The constable then delivered the key to Mr. Palmer, who took immediate possession of the goods by virtue of the writ of replevin, caused an inventory and appraisal to be duly made, and on the same day, viz., October 12, 1888, a bond was executed and delivered to him, which was intended to be in compliance with section 8324 of Howell's Annotated Statutes. This bond was not signed by the plaintiff, nor any one in its behalf, but was signed by two sureties. In form it was somewhat vague and uncertain, and the penalty named was but $600, while the goods had been appraised at $715.10. This bond is annexed to the return made by the deputy-sheriff, and is on file among the papers in said cause. Mr. Palmer then turned over the possession of the goods to plaintiff, and it has had the possession thereof ever since.

"In making the inventory, Mr. Palmer and the appraisers made some use of the inventory taken by Mr. Botsford; but such was done only to expedite matters, and as a matter of convenience, and no appraisal had been made before that made by the persons duly chosen by the deputy-sheriff. The inventory and appraisal so duly made are annexed to the return of the deputy-sheriff filed in the cause. Sometime after the service of the writ, viz., October 30, 1888, the deputy-sheriff advertised a sale of the goods replevied, to occur on November 5, 1888. On the day set for the sale the defendant paid to plaintiff the full amount of the mortgage debt, together with costs, and also the sum of $12, which had been previously paid by defendant on the mortgage debt, but for which the plaintiff had failed to give credit. On November 5, 1888, and shortly after defendant had paid plaintiff the full amount, as aforesaid, and had been given a receipt therefor, plaintiff's agent, Mr. Hill, tendered the defendant the immediate possession of the goods replevied, as they stood in the Geminder building; but defendant refused to avail himself of such offer.

"The goods have never been sold by plaintiff, nor by any person acting for or under it. At the time of the seizure of defendant's goods, several articles were taken by the plaintiff which were not covered by the mortgage and were not owned by the defendant. On these goods, which had been taken by the defendant to sell on commission, the latter had paid freightage and cartage,

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amounting to $10. The plaintiff has satisfied the claims of the actual owners of these goods for such unlawful seizure and detention in most instances, but the defendant has not been reimbursed for the freightage and cartage indicated. At the time of the seizure by plaintiff, namely, October 4, 1888, the defendant could have bought in the wholesale market goods equally as good as these taken from him for $570, which amount includes freightage, cartage, and other expenses incident to the purchase and transportation of goods bought at wholesale. If the goods taken from him had been new, and in perfect condition, they would have been reasonably worth $1,000 in the Three Oaks market at the time of seizure. As it was, they were reasonably worth $746.90, and such amount could have been realized within a reasonable time, and at an expense not to exceed $80. In fixing these amounts, I have not estimated the value of the Superior Drill Company's goods, nor of those owned by the Deering and McCormick people; it appearing evident that such three firms have been paid by the plaintiff for all losses sustained, and that their goods have been returned to them by the plaintiff. All other goods replevied have been considered in arriving at the values aforesaid; and, after taking out the Superior Drill, McCormick, and Deering goods aforesaid, the balance of the goods replevied were reasonably worth $746.90, as aforesaid.

"From the foregoing facts, I find as follows:

"The seizure by Botsford and the constable was a seizure by the plaintiff.

"The goods were replevied by plaintiff, and the bond executed and delivered to the deputy-sheriff was sufficient for the purposes of the proceeding. The use of an attachment form, and the recitals as to an attachment in the return of the sheriff, bearing upon oath and proceedings of appraisers, do not invalidate the proceeding. The appraisers were sworn in the replevin suit, and in no other; and it sufficiently appears so from the record. It was the duty of the sheriff to have returned the goods to the defendant upon failure of the plaintiff to execute a sufficient bond within 24 hours after seizure; but his failure to do so cannot release the plaintiff in this proceeding. The defendant is entitled to the value of the property taken (except the Deering, Superior Drill, and McCormick goods, aforesaid), notwithstanding the action

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of the sheriff, not making return to defendant within 24 hours.

"The defendant is entitled to recover $746.90; but, under all the circumstances of the case, there will be no allowance made for interest, nor for anything in the nature of punitive damages; nor will there be any allowance for any moneys ever paid by defendant to plaintiff.

"The defendant is entitled to the further sum of $10 for freightage and cartage on commission goods, but no allowance is made for income prospective, or other commissions.

"The plaintiff had the right to settle with other firms and individuals whose goods were taken at the time it seized defendant's stock, namely, the Superior Drill, McCormick, and Deering people.

"The defendant is not liable for any rental paid to Geminder.

"Let judgment be entered in favor of the defendant, and against the plaintiff, in the sum of $756.90, and costs of this proceeding.

"At the commencement of this suit, the plaintiff had a valid cause of action against the defendant."

Judgment was entered in favor of defendant for the value of the property at $746.90, and $10 damages, and costs. Plaintiff brings error. No part of the evidence is returned.

We are not called upon to consider the case, further than to determine whether the court was in error in its conclusions of law based upon these findings. From these findings, only one question is presented which we need consider.

It appears that after the defendant paid the mortgage plaintiff tendered the goods back, and the defendant refused to accept them. Under such circumstances the defendant, upon an assessment of damages, had no right to a judgment for the value of the property taken, nor for a return. The plaintiff came lawfully into possession under its mortgage, and by paying the mortgage the defendant cannot turn the plaintiff's possession of the

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goods into a wrongful holding, so that he may have judgment for costs. It was and is the defendant's right to have his goods back after paying his mortgage, but he could not insist upon their being returned to his store by the plaintiff. He must take them at the place where the plaintiff had stored them for safe-keeping.

The judgment of the court below must be reversed, and set aside. Plaintiff will recover costs of both courts; but from such costs, when taxed, defendant will be permitted to set off the $10 found his due by the court below.

The other Justices concurred.

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78 93
112 306

THE CITY OF GRAND RAPIDS v. GAIUS W. PERKINS.

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149 671

Opening streets—View of premises by jury—Evidence—Statutory construction.

1. Whatever the jury may learn of the lands sought to be condemned in a street-opening case under Act No. 124, Laws of 1883, by a view of the premises, may be used by them in determining the weight of conflicting testimony, but upon this view alone they cannot entirely disregard all other evidence, and fix and determine the compensation according to their own whims and caprices. *Close v. Samm*, 27 Iowa, 503.

2. Upon an appeal in a street-opening case, under Act No. 124, Laws of 1883, the statute provides that the case shall be treated as a chancery appeal, and that the appellate court may affirm, or for any substantial error reverse, the judgment, and may grant a new trial.

3. The question is not before us in the case whether either party, in a street-opening case under Act No. 124, Laws of 1883, may of right demand that the jury view the premises, but it is undoubtedly true that this right exists.

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Appeal from superior court of Grand Rapids. (Burlingame, J.) Argued October 25, 1889. Decided November 15, 1889.

Street-opening case. Defendant appeals. Reversed. The facts are stated in the opinion.

Taggart, Wolcott & Ganson, for appellant.

Wm. Wisner Taylor, City Attorney (*J. W. Ransom,* of counsel), for the city.

[The points of counsel are stated in the opinion.—REPORTER.]

LONG, J. This proceeding was instituted by the city of Grand Rapids under Act No. 124, Laws of 1883 (How. Stat. § 1295 *et seq.*). It was brought for the condemnation of nine parcels of land for the extension and improvement of one of the streets of the city. The cause was duly brought on for trial before a jury, proofs were introduced on either side of the controversy, and the case given to the jury under the charge of the court. After the jury had been in deliberation for some time, they returned into court and asked for further instructions, and the following proceedings were had:

"*By a Juror to the Court.* I am instructed by this jury to ask you this question: Can we award below the evidence or above it on any one parcel?

"*By the Court.* No, sir.

"*By a Juror.* That is what we wanted to know.

"*The Court.* Your view of the premises is a portion of the evidence in the case.

"*Mr. Tinker.* I don't understand they can take their judgment upon that matter outside of the sworn evidence in the case, and award a judgment below or above that evidence; that is my view of the matter.

"*Mr. Ransom (city attorney).* As the court says, their view of the premises is a portion of the evidence in the

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case, and they are entitled to use their own judgment in connection with the evidence in the case,—it may be above or below.

"*The Court.* That is all I have to say. You cannot award a greater amount or a less amount than the evidence in the case would warrant. Your view of the premises is evidence in the case.

"*Mr. Tinker.* Give me an exception to the ruling."

The jury then retired, and, after being absent for a time, returned into court, and rendered a verdict for less than the lowest amount fixed by any witness giving his sworn testimony.

The jury, under the direction of the court, during the proceedings had viewed the premises.

The instruction given the jury, in effect, was that while they could not find the value of any parcel less or greater than the evidence fixed it, yet their view of the premises was a portion of the evidence by which they might be guided in their judgment of value. In effect, the jury were told that although witnesses were sworn in the case, and gave testimony as to the value, yet the jury could disregard this testimony, and find the value according to their own judgment, inasmuch as they had viewed the premises. Counsel for the city contends that this is the correct rule, and cites Sutherland on Damages and *Brewer v. Tyringham*, 12 Pick. 547, as sustaining this rule, and claims that their findings may be more or less in amount than that stated by any witness.

Section 7 of the statute under which these proceedings are had provides:

"The jury shall hear the proofs and allegations of the parties, and, if so ordered by the court, shall go to the place of the intended improvement, in the charge of an officer, and upon or as near as practicable to any property proposed to be taken, and examine the premises."

This section further provides:

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"They shall be instructed as to their duties, and the law of the case, by the judge of the court, and shall retire under the charge of an officer, and render their verdict in the same manner as on the trial of an ordinary civil case," etc.

Section 15, Art. 15, of the Constitution of this State provides:

"Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

The statute above cited provides the mode of obtaining the jury under this provision of the Constitution, and prescribes the manner of proceeding before the jury to ascertain the necessity of taking private property for such uses, as well as the just compensation to be paid.

The Legislature have undoubtedly the right to fix by law the manner in which such compensation is to be ascertained and determined by the jury, and by this statute have provided that the jury shall hear the proofs and allegations of the parties, and when so ordered by the court the jury shall go to the place of the intended improvement. The question is not before us in this case whether either party may of right demand this view by the jury, but it is undoubtedly true that this right exists. It is, however, the plain intent of the Constitution that the Legislature shall fix the mode to be pursued by the jury in determining the just compensation. It cannot be true that the Legislature intended that the jury should determine this compensation solely upon view of the premises, and entirely disregard the evidence which the statute provides the parties may offer. If this is true then that provision of the statute is rendered entirely nugatory. The fact that a juror may have no knowledge whatever of the value of the property to be taken, or of

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the value of properties in that locality, might not disqualify him to sit; yet, under the contention of counsel for the city, he could disregard all the evidence introduced, and, upon a mere view of the premises, fix and determine the award to be made. This plainly is not the intent of this constitutional provision or of the statute.

Such values cannot be said to be of such common knowledge that every person qualified to sit as a juror in the case may determine it solely upon view alone. Certain conditions may exist, affecting values, which upon view would not be ascertained, and which could only be made apparent by the testimony of those well informed as to location and surroundings, and who have some knowledge of values. As was said by the court in *Washburn v. Railroad Co.*, 59 Wis. 364 (18 N. W. Rep. 328):

"To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination, and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or of the grounds of such opinions could not be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts, when all of the evidence is before it and there is none whatever to support the judgment. The court would be obliged to presume that the jury or some juror had, or at least thought he had, some personal knowledge of facts outside the testimony, or contrary to it, which would sustain the judgment."

Whatever the jury may learn of the lands in question by a view may be used by them in determining the weight of conflicting testimony, but upon this view alone they cannot entirely disregard all the other evidence, and

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fix and determine the compensation according to their own whims and caprices. These views are also fully supported by the case of *Close v. Samm*, 27 Iowa, 503. In the present case it is evident the jury discarded all the evidence, except their own view, and upon that alone determined the value. The court was therefore in error in the instructions given.

Some question is raised by the city attorney that the objection to this part of the charge and the exception taken was not made by the counsel representing the appellant in this cause, and therefore the appellant cannot now avail himself of it. There is nothing in this point. Upon an appeal to this Court the statute provides that the case shall be treated as a chancery appeal, and that this Court may affirm, or for any substantial error reverse, the judgment, and may grant a new trial.

The verdict and judgment must be set aside so far as affecting the lands of Mr. Perkins, and a new trial ordered. The appellant will recover his costs in this Court.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. SHERWOOD, C. J., did not sit.

THE PEOPLE v. ANTHONY KEIR.

[See 71 Mich. 92; 75 Id. 574.]

Municipal corporations — Ordinances — Markets — Obstruction of streets.

1. A proviso to a section in a city charter requiring that all ordinances shall be published for three successive days and take effect in ten days after their enactment, which empowers the

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common council to prescribe a different period, and provides that no ordinance shall take effect before one publication thereof, means that no ordinance can be enforced, and violation thereof punished, until the public have been informed of its enactment by at least one publication; the matter of publication being only essential before enforcement. *Stevenson v. Bay City*, 26 Mich. 49.

2. Section 11 of chapter 66 of the Revised Ordinances of 1884, of the city of Detroit, as amended April 5, 1889, does not prohibit farmers and gardeners from selling their produce through the city, or from casually stopping their wagons for that purpose, but is intended to prevent such wagons standing in the streets for the purpose of selling such produce, and with no intention of moving until it is sold, and is a reasonable restriction upon all classes, and within the power of the council to adopt, under a section of the charter giving them power "to prohibit and prevent incumbering or obstructing of streets," etc., "with vehicles, animals," etc.

Certiorari to recorder's court of Detroit. (Chambers, J.) Argued October 24, 1889. Decided November 15, 1889.

Respondent was convicted of selling produce on the streets of the city of Detroit contrary to an ordinance of said city. Conviction affirmed. The facts are stated in the opinion.

Wisner, Speed & Harvey (John J. Speed, of counsel), for petitioner.

Robert T. Gray, for respondent in *certiorari.*

[The points of counsel are stated in the opinion.—REPORTER.]

LONG, J. The defendant was prosecuted and convicted in the recorder's court under the following ordinance of the city of Detroit, and adjudged to pay a fine of two dollars:

"An ordinance to amend section 11 of chapter 66 of

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the Revised Ordinances of 1884, as amended April 5, 1889.

"It is hereby ordained by the people of the city of Detroit:

"SECTION 1. That section 11 of chapter 66 of the Revised Ordinances of 1884, as amended April 5, 1889, be, and the same is hereby, amended so as to read as follows:

"'SEC. 11. All farmers and gardeners selling, or offering for sale, from wagons, carts, or other vehicles, within the limits of the city of Detroit, any grain, vegetables, fruits, meat, live calves, sheep, poultry, or other articles of produce, shall occupy and stand with such wagons, carts, or other vehicles, and nowhere else, on the Central market, Cass market, and Eastern and Western markets, in the places established according to the first preceding section, where the market clerk, or other officer in charge of such markets, shall direct: Provided, That no person, while selling, or offering or exposing for sale, any of the above-named articles, shall permit any wagon, cart, or other vehicle to stand or remain on Bates street, Randolph street, Cadillac square, Congress street, Campus Martius, Monroe Ave., or Woodward Ave., within a distance of 500 feet from any part of said Central Market grounds.'

"SEC. 2. This ordinance shall take immediate effect.

"Approved August 2, 1889."

On the trial, it appeared that the defendant is a gardener, and resides some two miles outside the city limits; that about 6 o'clock in the afternoon of August 10, 1889, he drove upon Cadillac square, on the south side of the walk between Bates street and the market building, with his wagon, backed up to the walk, filled with vegetables; and he continued there, selling from his wagon, until half past 7 o'clock. At the time the defendant first stopped there, he was notified of the city ordinance, and that a complaint would be made against him if he continued selling in that place. While his wagon was so backed against the walk, his horse faced outward into the street, nearly to the street-car track, and at times the wagon was backed upon the sidewalk. The place he

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occupied was within 10 feet of the Central Market grounds.

At the close of the testimony, defendant's counsel moved to quash the complaint on the ground that the ordinance is invalid, for the reason that the same was ordered to take immediate effect; and, *second*, that there is no authority under the city charter for the enactment of said ordinance.

The provisions of the city charter relative to the publication of ordinances, and the time of their taking effect, are that—

"All ordinances shall be published for three successive days in such official daily newspaper, and shall take effect in ten days after their enactment: *Provided, however*, That the common council may fix and prescribe a different period, and that no ordinance shall take effect before one publication thereof." Local Acts of 1883, p. 602.

The ordinance in question was approved August 2, 1889, and the full three days of publication had elapsed before its violation by the defendant, though the full ten days had not elapsed before that time from the date of its approval. The proviso means that no ordinance can be enforced, and violation thereof punished, until the public have been informed of its enactment by at least one publication. The matter of publication is only essential before enforcement. *Stevenson v. Bay City*, 26 Mich. 49. It must be held that the ordinance was in force at the time of the act complained of.

Counsel for defendant claim, upon the other question raised, that the ordinance makes no provision in reference to the manner of selling, nor as to the place of standing, or the remaining of the wagons, in reference to public travel, but in effect totally prohibits the selling, or offering for sale, of products of any description from wagons; that it is an unnecessary, harsh, and oppressive

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restriction, not only as to producers, but to those desiring to purchase; that it is unnecessary and unreasonable, with reference to its avowed object, to prevent the obstruction of the streets, as the present ordinances are sufficient for that purpose; and that its object, apparent upon its face, is the creation of a monopoly of the trade by the hucksters occupying stands in the market.

Power is granted to the common council by the city charter of Detroit to establish markets, market-places; to lease market stalls, booths, and stands; and to provide fully for the good government and regulation thereof. Local Acts of 1883, p. 608, § 41.

In *Attorney General v. City of Detroit*, 71 Mich. 92 (38 N. W. Rep. 714), the legal history of this market-place, as a public market, is fully discussed by Mr. Justice CAMPBELL, from which it appears that this place, now called "Cadillac Square," was designated and set apart for a public market as early as 1833. Upon this—

"A building was erected, fronting on the Campus Martius, at the head of that avenue [Michigan Grand avenue], for the combined uses of a city hall and market; extending along the middle of the avenue, originally, about 100 feet. The lower story was used for meat stalls. Vegetables were sold in an open building not much sheltered except by a roof extending back in the avenue from the brick building; and the country wagons for the sale of market products were gathered along the avenue for some distance further. In process of time the buildings, both open and closed, were carried along so as to occupy the central part of the avenue to Randolph street, except as crossed by Bates street. In this way the whole of the avenue, along its middle portion, was made a market-place, sometimes called the 'City Hall Market,' and sometimes the 'Central Market.'"

In 1848, it was deemed advisable to formally vacate the middle 50 feet of Michigan Grand avenue, through its entire length, which was done by the action of the com-

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mon council and a jury of inquest, under the right of eminent domain. From that time to the present the city had occupied and claimed the whole space by title in fee, and has occupied it for market purposes. In that case the city was enjoined from interrupting the use of the market property, or any part of it, or any of the buildings used for that purpose, and directed to continue to maintain the market as such.

This 50-foot strip extends from the Campus Martius to Randolph street. The brick building facing the Campus Martius is 50 feet wide, occupying the whole market space, about two-thirds of the distance to Bates street. From that point the space is open to and across Bates street; and from Bates street a one-story, open, frame building, used for a vegetable market, extends nearly to Randolph street, occupying the whole 50-foot space. Sidewalks are carried along the sides of these buildings, for the accommodation of foot-travelers. On either side of this strip, extending the whole length thereof, is an open space in the square, which is used for street purposes, and is and has been for many years a public thoroughfare. Along the outer sides of this square are large retail business houses, and extending along in their front are sidewalks of the usual widths. Outside these walks are curbstones, at which the pavement of these thoroughfares commences. These public ways are about 50 feet in width on either side of the market, extending along the center of this entire space. On the eastern side of the market is the Fort Wayne & Elmwood Street Railway track, leaving a space between the track and the market buildings and grounds of about 17 feet. This market-place is situate in the center of the heart of the city, and the thoroughfares on either side are daily traveled by a great number of wagons and other vehicles, and by people on foot; and the street-cars on the eastern

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side are in constant use for public convenience. The smallness of this market-place has necessitated the setting aside of grounds and space for such purposes, and the council have established other market-places; the Cass market, and the Eastern and Western markets, and the Eastern hay-market, all within the city, all paved, and upon which wagons may stand.

On September 25, 1888, and after the opinion was filed in *Attorney General v. City of Detroit, supra,* the council passed an ordinance designating these spaces as public market-places. This additional market space was established with a view to further changes in the regulations of the Central market, as was done by the ordinance amendatory to section 11, chap. 66, above referred to. This ordinance was adopted as soon as the new space was made available for occupancy, and its purpose was to prohibit the sale of produce on the Central market, except from the stalls or stands.

In *Hughes v. Recorder's Court,* 75 Mich. 574 (42 N. W. Rep. 984), the validity of this ordinance came before this Court, and in an opinion by Mr. Justice CAMPBELL it was held that the ordinance prohibited the sale of articles on the principal market of the city, except from stands leased by sellers, and confines farmers and others, with their vehicles, to other markets, where the accommodations are inadequate, and virtually shuts out the latter class of vendors from said market, without giving them any substitute for it, and requires their articles to be sold by the lessees of the stalls, and is therefore void. While this opinion was concurred in by the other members of the Court, yet all the other members expressed their views that the charter of the city of Detroit confers full authority upon the common council to pass and enforce ordinances to prohibit and prevent the incumbering of streets, and to prevent obstructions to public

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travel over the streets and public places in the city, by vehicles or otherwise, outside of the market limits.

Section 11 being held void, the council re-enacted it as it was prior to the above amendment, and, for the purpose of rendering the enforcement of sections 11 and 12 easier, added the amendment of August 2, 1889. This section adds no new features to sections 11 and 12, as they stood prior to the amendment of April 5, 1889, which was held void in *Hughes v. Recorder's Court, supra.* These sections formerly read as follows:

"SEC. 11. All farmers and gardeners selling, or offering for sale, from wagons, carts, or other vehicles, within the limits of the city of Detroit, any grain, vegetables, fruits, meats, live calves, sheep, poultry, or other articles of produce, of their own raising, shall occupy and stand with such wagons, carts, or other vehicles, and nowhere else, on the Central market, Cass market, and Eastern and Western hay-markets, in the places established according to the first preceding section, where the market clerk, or other officer in charge of such markets, shall direct.

"SEC. 12. All persons, other than farmers and gardeners, selling, or offering for sale, from wagons, carts, or other vehicles, any meat, vegetables, fish, dressed poultry, butter, live calves, sheep, lambs, or poultry, fruits, flowers, plants, or other articles, shall occupy and stand with their teams, and at no other place, on the Eastern and Western hay-markets, in the places established according to section ten (10) of this ordinance, where the pound-master, or other officer in charge, shall direct. In addition to his other duties, it is hereby made the duty of each pound-master to carry out the provisions of this ordinance in his district."

Counsel for the city contends here that section 11 granted to farmers and gardeners the right to stand with their wagons, for the purpose of selling produce, on any of our public markets, and prohibited them from standing elsewhere, and section 12 granted to persons other than farmers and gardeners the right to stand on the Eastern and Western hay-markets, and prohibited them

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from standing elsewhere; that by these sections nobody had the right to stand on any street, with their wagons, while selling, etc., but, in enforcing the ordinances, if the person so standing in the street was a farmer or gardener, the complaint would have to set forth a violation of section 11, and otherwise, of section 12; and that, as the violations were all in the street adjacent to the Central market, and the persons violating the law were largely peddlers, selling the articles they had purchased of the producer or commission merchants, as well as farmers selling their own produce, the addition was made to section 11, so as to avoid the necessity of proving the fact whether the person complained of was a farmer or gardener, or otherwise.

It is contended, further, that farmers and gardeners are not prohibited from selling their produce through the city, or from casually stopping their wagons for that purpose; and our attention is directed to chapter 72 of the Revised Ordinances of 1884, which provides that persons having the proper license may peddle in the streets, but are required to keep their vehicles in motion, except when making a sale, when they are to draw up to the curbstone, and farmers and gardeners, selling their own produce, may peddle without being obliged to pay a license fee. In this contention we think counsel correct. The act sought to be prohibited is the permitting a wagon to stand in the street for the purpose of selling, and with no intention to move it till the produce is sold.

This ordinance is a reasonable restriction upon all classes, to prevent the incumbering or obstruction of the streets of the city, and within the power of the council to adopt. Section 122 of the charter of 1886 gives the common council power—

"To prohibit and prevent incumbering or obstructing of streets, lanes, alleys, cross-walks, sidewalks, and all

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public grounds and spaces, with vehicles, animals," etc. The place where defendant was standing with his wagon was within the space which, as is prescribed in this amendment of section 11, shall be kept clear and unobstructed by this traffic. It is evident that these spaces on either side of the Central market, which have become public thoroughfares, are too narrow to admit of teams, wagons, and other vehicles standing there for the purpose of trade from such vehicles. The market grounds themselves are set apart for the purposes of such trade. It does not follow that because the city authorities are prohibited from discontinuing the city market, and are compelled to keep and maintain it there, and that the space is too small to accommodate all who desire to sell their products, that the city authorities cannot keep the streets, and other public places surrounding it, clear and unobstructed for the convenience of public travel. It is evident that on certain hours of the day these public highways are crowded with teams and wagons, by persons who are desirous of selling, and who cannot be accommodated within the market space, and Campus Martius and Cadillac square, as well as Bates, Randolph, and other streets within the 500-foot limit, are constantly overrun with these vehicles.

These markets are established for the convenience of the public, who purchase such products, and not alone for the convenience of the parties who desire to sell. The traveling public have the right of passage by wagons and other vehicles upon and along these highways, and, under the provisions of the charter above quoted, it became the duty of the council to provide a way for the public to pass, and to remove all obstructions to the way of travel. This is a reasonable regulation.

The defendant was properly convicted, and the judgment must be affirmed.

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SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred with LONG, J.

CAMPBELL, J., *(dissenting).* I do not care to go into any extended argument on a matter in which I am unable to agree with my brethren, and shall, as briefly as I can, indicate my own view on the main question involved.

Until the recent ordinance, I am very sure it was always supposed that an out of doors market is chiefly valuable for the facilities it furnishes to producers to come together at one common resort, to sell their produce. In my judgment, this ordinance is not only oppressive, but practically a fraud, favoring special interests. According to the record, it appears that the market space in the middle of Cadillac square is built over for the greater part of its extent, and that the only open space entirely within it is ridiculously small to accommodate the country wagons, being no larger than an average city lot. Until recently, as appeared in the *Henkel Case*, the city found no difficulty in giving space for wagons over a large extent of the square for some hours of the day; and we held such use of the street of which it consists was proper, and to be expected, about a market. In all parts of the world, and in cities much more considerable than Detroit, the temporary use of adjacent streets has always been deemed an essential part of the surroundings of a market. The law of markets, as exemplified in the common-law precedents, shows this very clearly. One of the prominent reasons now urged, although what part it plays in the record I do not understand, is the purpose of the city to allow another street railway to occupy the space which without it would be of entire convenience for market purposes. On what pretext it can be held that such a scheme can be allowed to crowd out the market is not at all clear to my mind. This ordinance

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further provides a rule of exclusion from Cadillac square, and other named streets, to a distance of 500 feet from the market space, for no conceivable reason of relieving the pressure round the market, as it covers a range entirely beyond reach of it, and appears to have no definite object, beyond isolating the market from traffic, and rendering it insignificant. That this ordinance entirely changes the character of this market is palpable. That the asserted necessity is one created by the city itself, and extremely well adapted to destroy the market, is equally plain. Nor do I think the location of the supplementary markets elsewhere is much more than colorable. The record certainly does not show that it is. It seems to me that our action, if we sustain this prosecution, allows to be done by evasion what is just as effectual for mischief, as a bolder and more direct refusal to respect the legal and honest obligations of the city.

I think the ordinance should not be sustained, and that the conviction was wrong.

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WILLIAM BEARINGER v. ROLLIN H. PELTON.

Administrators — Equity — Partition — Dower — Infancy — General guardian—Cannot bind infants by consent decree.

A father conveyed two parcels of land—one his homestead—to his son, the mother not joining in the deed, and remaining in possession of the homestead until the death of the son, who left a widow and minor children surviving him. After the appointment of an administrator of the son's estate, a second son filed a bill against his mother, the administrator, and the said widow and minor children, to set aside said deed for fraud and other causes, and praying partition of both parcels; in which

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bill he recognized and asserted the dower interest of his mother, who was in sympathy with him in the suit, although a nominal defendant, and who filed a cross-bill against the complainant and her co-defendants asking assignment and partition of dower on one parcel of said land, and a life-estate in the homestead forty acres, and damages for her past dower since her husband's death, which occurred some years prior to that of her son. The administrator, and the son's widow and heirs, answered the cross-bill, and admitted the mother's right to dower, unless barred by statutory limitation, and also claimed the benefit of a demurrer. At the close of the litigation a consent decree was made fixing a certain sum as due the mother for dower, which the administrator paid, and which was allowed to him on the settlement of his final account, from which an appeal was taken and said allowance affirmed; and in reviewing said decision the following propositions are stated:

1. The cross-bill of the mother was not called for by anything in the original bill, and was unnecessary so far as the land was concerned. Her claim for arrears of dower, if valid at all, was one against the administrator, and did not concern the heirs, except through him. Her husband's death extinguished the homestead right sought to be asserted, if it had existed, and there was no occasion to go into equity for her dower in any of the land.
2. If the mother had any claim for arrearages against the intestate (her son) when he died, it should have been established separately as a claim against his estate. It could not properly be mixed up with any claim against his heirs after his death, which could only be made out by proceedings in ejectment as damages for withholding the possession after the right of dower was determined.
3. Infants sued are under the law to be defended by guardian *ad litem*, and not by general guardian, nor has a general guardian the right to bind the infants by a consent decree.
4. The claim for dower paid to the mother by the administrator is disallowed, and the decree otherwise affirmed.

Case made from Ottawa. (Arnold, J.) Argued October 25, 1889. Decided November 15, 1889.

Appeal from order allowing an administrator's final account. Reversed as to dower payment, and affirmed as to balance. The facts are stated in the opinion.

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Frank L. Carpenter, for appellant.

George A. Farr, for defendant.

CAMPBELL, J. This case brings up the settlement of defendant's account as administrator of the estate of Orwin A. Lord, deceased. The case on the record is peculiar. It was appealed from the probate court of Ottawa county, and the Ottawa circuit court made a reduction against defendant's outlays for counsel, but allowed him everything else. He appeals against this reduction, while the guardian of infant heirs appeals from a large part of the allowance for various outlays as not justified by law. Had the parties interested all been of age, and capable of estoppel, we should not be disposed to disturb what was no doubt an honest course of dealings. But we have no authority to allow illegal dealings as against infants, and we think there were some such here.

Orwin A. Lord died November 19, 1880, leaving a widow, Mary J. Lord, and three minor children. Defendant, Pelton, was appointed administrator in January, 1881. The estate consisted of two 40-acre lots, lying together, and appraised at $1,200 each (making $2,400), and $1,116.60 personal property. No accounts against deceased were ever presented against his estate, and in March, 1884, an account was filed bringing the estate in debt to defendant for matters occurring entirely after the death of the intestate as expenses of litigation. The final account now appealed from is made up of additional expenses of the same kind and of a payment of a dower claim of the intestate's mother in the land. In order to meet this, the administrator raised $700 by mortgage on one of the parcels of land.

As appellant claims that this litigation did not concern

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the administrator wholly, if at all, it requires explanation.

Orin Lord, father of Orwin, once owned the land in question, and it is claimed, and is so established, conveyed it to Orwin during his life-time. He left a widow, Abigail Lord, and a son, Francis, and the intestate, surviving him. The intestate was in possession of the property. In 1881, shortly after the administrator got his letters, Francis Lord filed an amended bill against Abigail Lord, the widow of Orin, and against defendant and the widow and heirs of intestate, to set aside the conveyance from his father to Orwin for fraud and other causes, and praying partition of both parcels, recognizing and asserting Abigail's dower interests. On this bill the decree was against complainant. Abigail Lord filed a cross-bill against complainant and the other defendants, asserting that she had supposed Orwin had good title until recently, asking assignment and partition of dower on one lot and life-estate in the other, and damages for her past dower since her husband's death.

In their answer to this cross-bill defendant and intestate's widow and heirs admitted Abigail's right to dower, unless barred by statutory limitation, and claimed it was so barred, and also claimed the benefit of demurrer. At the close of the litigation a sum of $360 was settled by consent decree as due Abigail for dower, and this sum is a chief part of the claim of defendant. He also claims expenses of litigation, which included $435.43 paid his solicitor, which last item the circuit court reduced to $200.

The original bill did not dispute Abigail's dower, and had partition been granted the complainant admitted it would be set out. But whatever arrears of dower were due from intestate in no way concerned complainant, and were not referred to in his bill.

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Abigail Lord's cross-bill was not called for by anything in the original bill, and was unnecessary, so far as the land was concerned. Her claim for arrears of dower, if valid at all, was one against the administrator of intestate, and did not concern the heirs, except through him. She claimed an entire homestead right in one of the forties for life, and dower in the other. Her husband's death would have extinguished the homestead, if it had existed, and there was no occasion to go into equity for her dower in any of the land.

This cross-bill contained nothing on which she was entitled to relief in equity against intestate's estate or heirs or the original complainant. It was fatally demurrable, and would have been so held if this point had been pressed, as it should have been. The decree, however, dismissing the original bill, which was the only one making any equitable case, proceeded to decree to Abigail arrears of dower from the death of her husband, and referred the ascertainment to a commissioner. After this a decree was made by written consent of Abigail Lord, defendant, and Mary J. Lord, as general guardian, fixing the damages up to 1883 at $300, and for that year at $60. It was under this decree that defendant paid that sum, which the circuit court regarded as proper to be allowed to defendant, because no more than the heirs and estate would have had to pay, at any rate.

But we do not so regard it. If Abigail Lord had any claim for arrearages against intestate when he died, it should have been established separately as a claim against his estate. It could not properly be mixed up with any claim against his heirs after his death, which could only be made out by proceedings in ejectment as damages for withholding the possession after the right of dower was determined. Infants sued are under the law to be

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defended by guardian *ad litem*, and not by general guardian. If the claim for arrears had been presented for proof, it would have been the duty of the administrator to defend, if there was any defense, in whole or in part. We have no means of knowing just what sums should have been allowed. It is very certain that a part of the claim was outlawed before intestate's death, and that the decree provided for no deduction on that account. It is also certain that the administrator was not accountable for dower after intestate's death, and had no right to pay it. The general guardian had no right to bind the infants by a consent decree. *Burt v. McBain*, 29 Mich. 260; *Wood v. Truax*, 39 Id. 628; *Claxton v. Claxton*, 56 Id. 557 (23 N. W. Rep. 310); *Chandler v. McKinney*, 6 Id. 217. The allowance actually made was also made after some sort of deduction of counter-claims or reductions arising from Abigail's being in joint possession. What these amounts were, or how far her joint possession would have extinguished her dower, we have no means of judging.

While it might be proper, in such a controversy as this on behalf of the heirs, to look at the equities, and not require the administrator to account for what he would have a claim for in another shape, we are met with the difficulty that it is absolutely impossible to determine how much Abigail Lord ought to have had, and that impossibility arises from the manner in which the controversy was conducted. The administrator, by a consent agreement, cut off an appeal which must have resulted in the dismissal of the cross-bill.

The court below thought that a part of the litigation was necessary, as the original bill had to be defended, and held that $200 was not an unreasonable amount. While we think the chancery business was not managed as it should have been for the interest of the estate, we

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are not disposed to disturb this allowance, although it is certainly very liberal, under the circumstances. But the whole amounts paid to Abigail Lord must be disallowed. With that exception the account will stand as fixed by the circuit court. Interest at 6 per cent. must be allowed on the $360 paid Abigail.

The decree below must be reversed as to this dower payment, with costs of this Court, and affirmed as to the balance. The issues being clear, we have not deemed it necessary to discuss the technical questions presented by the argument.

CHAMPLIN, MORSE, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

STEPHEN F. DOWLING AND DAVID DOWLING v. SOLOMON HANNANT AND GEORGE HANNANT.

Statutory construction—Forcible entry and detainer act—Chancery foreclosures.

How. Stat. § 8295 (subd. 3), giving a summary remedy for securing the possession of premises sold by virtue of any mortgage or execution, applies, by its terms, only to redeemable foreclosures, and cannot cover chancery sales without enlarging it beyond its terms, and interfering with the legitimate powers of courts of equity.

Appeal from Calhoun. (Hooker, J.) Argued October 30, 1889. Decided November 15, 1889.

Proceedings under forcible entry and detainer act. Defendants bring error. Reversed and proceedings quashed. The facts are stated in the opinion.

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Hulbert & Mechem, for complainants.

Volney H. Lockwood, for defendants.

CAMPBELL, J. In this case complainants were allowed in the court below to recover possession under a chancery foreclosure sale, by proceedings under the forcible entry and detainer act, commenced before an officer having the jurisdiction of a judge at chambers.

These proceedings, which are summary, and provide for getting possession of land without the forms of law to which parties are entitled in courts of justice, are purely statutory, and cannot be allowed in any case not clearly within the statute.

Where a chancery sale is conducted under a decree in equity, the court granting the decree has full power to give possession against parties bound by the decree, and can in each case secure all the rights of persons whose interests are involved. There is no need of other relief, and, if sought elsewhere, it may interfere with the proper control of the court of equity over its own process.

The only clause relied upon by complainants is that which gives the remedy—

"When any person shall continue in possession of any premises, sold by virtue of any mortgage or execution, after the expiration of the time limited by law for the redemption of such premises." Subdivision 3, § 8294, How. Stat.

The same subdivision applies to probate sales.

In execution and probate sales the court under which title is made has no power whatever to put purchasers into possession. Their only remedies are by distinct possessory suit of some kind. In execution and statutory foreclosure sales the purchaser gets only an inchoate title, contingent on failure to redeem. In chancery sales there is no redemption. The statute giving summary remedies

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applies, by its terms, only to redeemable foreclosures, and it cannot cover chancery sales without enlarging it beyond its terms, and interfering with the legitimate powers of courts of equity.

Judgment must be reversed, and the proceedings quashed, with costs of all the courts.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

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HENRY HEWITT, JR., v. PETER WHITE,

AND

HENRY HEWITT, JR., v. HARRIET A. OSBORN.

[Two Cases.]

Tax sales—Illegal tax—Authority of supervisors to pay a salary to sheriff in lieu of fees.

1. The board of supervisors have no power to allow the sheriff an annual salary for services rendered the county, in lieu of all fees, and a sale of land to satisfy a tax made up in part of such illegal salary is void.

2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—It has been pointed out more than once by the Court that the sheriff must be confined to his statutory fees in all cases where they are fixed by statute. *Burk v. Webb*, 32 Mich. 178; *Clark v. Supervisors*, 88 Id. 658; *Peck v. Bank*, 51 Id. 353. And demanding and receiving more is a misdemeanor. How. Stat. § 9256.

b—Most of the sheriff's statutory fees relate to services in connection with the administration of civil and criminal justice, and the keeping and control of prisoners. There are

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the strongest reasons why such matters should not be left to the supervisors, but it is enough for the present purpose that they have not been so left.

c—The sheriff has it in his power to forward or hinder the course of criminal justice in many respects. It is essential to public safety that its administration be kept as far as possible free from any extraneous meddling or interference, and, if the supervisors or any other body can have a voice in the payment of the sheriff's charges, it is evident that his subservience to them is invited, if not compelled, and that they can have a good deal to do with the pursuit or exemption of criminals.

d—We have been compelled several times to compel the payment of justices' fees for criminal examinations that did not terminate as the supervisors desired, or which were prosecuted against their wishes.[1]

e—If the principle is once admitted that any deviation can be had from the statutory allowances, the temptation is directly offered to the sheriff to make himself agreeable to the board on the one hand, and to shirk unprofitable duties on the other.

Error to Marquette. (Grant, J.) Argued October 29 and 30, 1889. Decided November 15, 1889.

Ejectment. Plaintiff brings error. Reversed. The facts are stated in the opinion.

F. O. Clark, for appellant, contended:

1. In support of the proposion that the board of supervisors had no power to allow the sheriff a salary in lieu of statutory fees, counsel cited: *People v. Supervisors*, 8 Mich. 475; *People v. Auditors*, 13 Id. 233; *Kennedy v. Gies*, 25 Id. 89, 90; *Mixer v. Supervisors*, 26 Id. 422; *Burk v. Webb*, 32 Id. 182; *Peck v. Bank*, 51 Id. 355; *Follensbee v. Supervisors*, 67 Id. 614; *Clark v. Supervisors*, 38 Id. 658; *Vincent v. Supervisors*, 52 Id. 340.

Ball & Hanscom, for defendants, contended:

1. The action of the board in voting such salary was a mere estimate of the amount of money that would be required to pay the sheriff for services to be rendered for the year. In the case of *Sawyer-Goodman Co. v. Crystal Falls*, 56 Mich. 600, it was held that such action by the township board should be so construed.

[1] See *Jaminet v. Supervisors of Monroe Co.*, 77 Mich. 245.

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2. It is not shown that the plaintiff or any tax-payer was injured by the action of the board in appropriating $1,500 as a salary to the sheriff; citing How. Stat. § 1165; and confessedly, it was within their power, and was their duty, to provide money by tax to pay the sheriff for his services rendered the county. It is fair to presume that in determining the amount to be raised by county tax, a sum was estimated for that purpose, and as they voted to appropriate $1,500 for sheriff's salary for the next ensuing year, it may be considered probable that they included that amount in their estimate, unless they had moneys on hand applicable thereto. But it is not fair to presume, and cannot properly be presumed, that the supervisors would pay that amount through the year, unless they were satisfied that the sheriff was lawfully entitled to it. They were at liberty to change or abolish the "salary" whenever they saw fit; in fact, if unlawful, as claimed, the "salary" could be disregarded, even after the services were rendered, and the sheriff remitted to his lawful fees. But payment to the sheriff of excessive compensation would not invalidate a tax levy made for lawful purposes.

CAMPBELL, J. These are ejectment cases involving the sufficiency of tax-titles. The chief question raised touching the tax of 1878 relates to its including the salary of a sheriff, at a sum of $1,500, in lieu of all fees for services rendered the county. Payment was made in pursuance of this resolution.

It has been pointed out more than once by this Court that the sheriff must be confined to his statutory fees in all cases where they are fixed by statute. *Burk v. Webb*, 32 Mich. 173; *Peck v. Bank*, 51 Id. 353 (16 N. W. Rep. 681); *Clark v. Supervisors*, 38 Id. 658. Demanding and receiving more is a misdemeanor. How. Stat. § 9256.

Most of the sheriff's fees fixed by statute relate to services in connection with the administration of civil and criminal justice, and the keeping and control of prisoners. There are the strongest reasons why such matters should not be left to the supervisors, but it is enough for the present purpose that they have not been so left. The sheriff has it in his power to forward or hinder the

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course of criminal justice in many respects. It is essential to public safety that its administration be kept as far as possible free from any extraneous meddling or interference, and, if the supervisors or any other body can have a voice in the payment of the sheriff's charges, it is evident that his subservience to them is invited, if not compelled, and that they can have a good deal to do with the pursuit or exemption of criminals. It has been brought to our attention, as it has been to that of the Legislature, that county officials dependent on the supervisors have professed to be influenced by their views of economy in their action in criminal prosecutions. We have been compelled several times to compel the payment of justices' fees for criminal examinations that did not terminate as the supervisors desired, or which were prosecuted against their wishes. That such influences have actually succeeded with officers lacking firmness there is no reason to doubt. If the principle is once admitted that any deviation can be had from the statutory allowances, the temptation is directly offered to the sheriff to make himself agreeable to the board on the one hand, and to shirk unprofitable duties on the other.

The law has left some cases subject to the supervisors, and appointed no specific fees. It is possible, although no such cases were suggested, that the sheriff may have some functions not more appropriate to his office than to any other. But the resolution does not confine his salary to services that might be contracted for. It aims directly at services deemed necessary to be subjected to fixed compensation, which only concern the county as one of the agencies of governmental administration, and not as a local body acting for local interests.

In a matter of such direct public concern it is not safe to hold, as we are asked to hold, that, although illegal, the illegality shall have no effect. There can be no

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doubt on the record that the illegal salary entered into the levying of the tax, and is one of serious importance. There can be no reason why the mischief cannot be indefinitely perpetuated, if allowed to go unredressed. In our opinion, the tax is void for this transaction, and should be so declared.

The judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

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GEORGE HEFFELMAN v. OTSEGO WATER-POWER COMPANY.

Water privileges—Construction of contract.

1. A survey referred to in a deed for greater certainty forms a part of it, and both should be construed together.
2. A deed cannot be made worse by the introduction of testimony conforming to it, and, even if such secondary evidence is incomplete, the party objecting to it cannot complain of an immaterial error.
3. This case involves the construction of a deed of a right of flowage, and it is held that the marks on certain trees mentioned in the deed were established as points or levels from which to measure *downward*, the number of inches specified, to the point or line beyond which the water could not be raised.

Error to Allegan. (Arnold, J.) Argued October 31, 1889. Decided November 15, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Howard & Roos and *William B. Williams*, for appellant.

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J. V. Rogers and *Phillip Padgham*, for plaintiff.

CAMPBELL, J. Plaintiff sued defendant for overflowing his land. It appeared that in 1866, in consequence of a dispute concerning flowage, an arbitration was had which resulted in an agreement whereby, in consideration of $75, a 99-years' privilege was granted defendant to raise the water, according to the following terms:

"The arbitrators have caused a survey to be made, and marks to be made by the county surveyor, which said marks are to designate the height to which the said water-power company, or their successors and representatives, are to raise the dam across the Kalamazoo river, and which marks are as follows: The first mark is at a point 30 and 11-16 inches above the height of the dam, and on the south side of the buttonwood tree 6 inches in diameter, 17 rods and 12 links south, and 14 links west, of the ¼ post on the north line of section 23, in said township and range. The second mark, 26¼ inches above the dam, on a buttonwood stub 5 inches in diameter, south, 28 degrees west, from the first mark, and between the river and race. The third mark is on a level with the top of the dam or slash-boards, on an elm tree about 12 inches in diameter, and stands south, 50 degrees 10 minutes west, from the first mark, and between the race and river,—all as made and designated by Ira Chichester, county surveyor, September 3, 1866; and for a more particular description thereof reference is had to said record by said surveyor in his office, and in the register's office of the county."

The buttonwood tree is the only land-mark left. The only contention of any consequence is whether the mark on that tree is the mark of the water-level agreed upon, or 30 and 11-16 inches above it. Defendant claims the deed cannot be explained *aliunde*, and that the true mark is at the stipulated water-level, and not above it.

The Chichester survey is lost, but secondary evidence was let in, which seems to us to comply with all the legal rules for its admission. That survey very distinctly

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indicates, and the finding establishes, that the witness marks on the buttonwood tree and stump were meant to be above the water-line to the extent named, and the elm-tree mark to be on a level with it.

As this survey is referred to in the deed for greater certainty, it legally formed a part of it, and both should be construed together

But we see no ambiguity in the deed. No two of the tree marks are on the same level. If the buttonwood-tree mark should govern, the water would cover the stump mark, and rise two feet and a half above the elm mark. And if the buttonwood-tree mark should stand as the level, it would be surrounded by water up to that height, and not visible unless at lower water. It is certain that water could not at the same time be at two different levels on the different sides of the stream, and no one would place land-marks where they could be of no possible practical use.

The deed could not be made worse by the introduction of testimony conforming to it, and defendant, even if the secondary evidence was incomplete, could not complain of an immaterial error.

The judgment below conformed to the agreement, and must be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

In this case a rehearing was granted at the January term, 1890, and the following opinion was filed, February 20, 1890:

CAMPBELL, J. A rehearing of this case was allowed to defendant upon a claim that some matters in the record had been misapprehended. On a re-argument, we have found no reason to change the views expressed

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in our former opinion, that defendants were not entitled to raise the water up to the marks on the buttonwood tree and stub mentioned in their grant or lease of the right of power, but, on the contrary, that the marks referred to in the lease were established as points or levels from which to measure downward, the number of inches specified, to the point or line beyond which the water could not be raised.

The judgment below will therefore stand affirmed, with costs of both hearings in this Court.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

WILLIAM T. THORP v. WILLIS P. DEMING.

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Promissory notes—Usury—Want of consideration—Challenge of juror.

1. Refusal to allow a peremptory challenge after the jury is sworn in is not error.
2. A note given in renewal of one which is paid, so far as lawfully collectible, and which is not supported by any new consideration, is void for want of consideration.

Error to Lenawee. (Lane, J.) Submitted on briefs October 31, 1889. Decided November 15, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Westerman & Westerman, for appellant, contended:

1. Act No. 147, Laws of 1883, gives each party the right to four peremptory challenges; and, as the record fails to show that

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the twelve jurors had been "approved as indifferent between the parties" before they were sworn, as required by statute, plaintiff should have been permitted to use his remaining peremptory challenges; citing How. Stat. § 7599; *Mining Co. v. Johnston*, 23 Mich. 36.

2. When the new note was given for the original indebtedness, with the interest and cost of making the papers added, the question of what was paid by the defendant to secure an extension of time, or for the use of the money, becomes immaterial, as it does not enter into the contract in question; citing *Smith v. Stoddard*, 10 Mich. 148; *Gardner v. Matteson*, 38 Id. 203; *Havens v. Jones*, 45 Id. 253; *Iron Co. v. Burkham*, 10 Id. 283; *Craig v. Butler*, 9 Id. 21; *Chadbourn v. Watts*, 10 Mass. 121; *Clark v. Phelps*, 6 Metc. 296; *Darling v. March*, 22 Me. 184.

3. Under our statute the taking of usury only avoids that part which is usurious, which may be deducted; citing How. Stat. §§ 1594, 1595; and usury must be pleaded; citing *Fay v. Crimsteed*, 10 Barb. 321; *Bank v. Foster*, 44 Id. 87; *Frank v. Morris*, 57 Ill. 188 (11 Am. Rep. 4); Abbott, Trial Ev. 791; *Gardner v. Matteson*, 38 Mich. 200.

Millard, Wood & Bird, for defendant, contended for the doctrine stated in the opinion.

CAMPBELL, J. Suit was brought on a note for $24.60, dated April 18, and payable in four months. The defense relied on was that this note was given to renew a former one, which was itself in renewal of a still earlier one, and that all of the real principal borrowed, with full legal interest, had been paid, so that the claim was merely for usurious interest. The jury sustained this defense. On the trial, and after the jury had been sworn, but before proofs were introduced, plaintiff asked leave to challenge a juror peremptorily, which was refused. No authority has been shown to us for allowing a peremptory challenge after the jury is sworn, and there was no error in so holding.

There was a conflict of testimony on the facts. It was substantially agreed that the issue depended on whether the second note had any consideration. Defendant's tes-

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timony, which the jury believed, showed that the first note was overpaid, so far as lawfully collectible, and that there was no new consideration for the second, which was obtained by pressure, under threats of foreclosing a chattel mortgage. The jury had the law fairly before them, and there is no reason to disturb their verdict.

The judgment must be affirmed, with costs.

The other Justices concurred.

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GEORGE B. RIPLEY v. GEORGE F. CASE.

Fraudulent sale—Assumpsit—Common counts—Recovery of money paid for worthless bond—Directing verdict.

1. Money paid without consideration may be recovered under a declaration on the common counts for money had and received.
2. The abbreviation, "M. C. R. R.," is the recognized name of the Michigan Central Railroad.
3. The absence of past-due coupons is some indication that a coupon-bond is not in default.
4. If a bond is represented as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and if it is purchased honestly on such a recommendation, it is a fraud to so transfer it, if such representation is false.

   So *held*, where the owner of a bond belonging to a series issued by the Michigan Air Line Railroad Company, and which was of no value by reason of the foreclosure of the accompanying mortgage, placed it in the hands of a broker for sale, representing it to be an "M. C. R. R." bond, which latter road had become liable on a series of bonds known as "Air Line" bonds, which were at a premium in the market. The bond left for sale bore a general resemblance to the Michigan Central bonds, and the past-due coupons had been removed. The broker made a sale of the bond, and on the fraud being discovered, and the owner refusing to refund the money, the purchaser brought suit to recover the same, and it is held that he made out a case for recovery, and had a right to go to the jury.

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Error to Wayne. (Gartner, J.) Argued November 1, 1889. Decided November 15, 1889.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Barbour & Rexford, for appellant, contended:

1. Substantial error between the parties to a contract of sale, concerning the subject-matter of the article, destroys the consent requisite to its validity; citing 2 Kent, Com. 471, 477, 479 (notes); 1 Benj. Sales, § 61 (note); *Gibson v. Pelkie*, 37 Mich. 380; *McGoren v. Avery*, Id. 120; *Ferguson v. Hemingway*, 38 Id. 159; and the present case is entirely within the principle of *Sherwood v. Walker*, 66 Mich. 568.
2. An illegal act, prejudicial to the rights of others, is a fraud upon such rights, although the parties deny all intention of committing a fraud; citing *Kirby v. Ingersoll*, Har. Ch. 191; and one who dissuades another from inquiry, and deceives him to his prejudice, is responsible; citing *Starkweather v. Benjamin*, 32 Mich. 305.
3. If one obtains the property of another by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud; citing *Converse v. Blumrich*, 14 Mich. 128; *Beebe v. Knapp*, 28 Id. 75; *Stone v. Covell*, 29 Id. 359; and it is sufficient if they have the effect of fraud; citing *Mooney v. Davis*, 75 Mich. 188.
4. One who is sued for fraud is estopped from claiming that the plaintiff's previous knowledge was enough to protect him; citing *Hamilton v. Billingsley*, 37 Mich. 107
5. The principal is liable to third persons for the misrepresentations of his agent, in the course of his employment, although the principal did not authorize them; citing Story, Ag. § 452
6. Plaintiff is entitled to recover on the common counts for money had and received. The bond being worthless, the money was obtained without consideration; citing *Murphy v. McGraw*, 74 Mich. 318.

Alfred Russell, for defendant, contended:

1. In order to sustain this action in *assumpsit* on the common counts there must be a *privity* between the plaintiff and the defendant; citing *Jones v. Carter*, 8 Q. B. 134; *Calland v. Loyd*, 6 M. & W. 26; and, upon the testimony, there was none whatever, or any dealing between the plaintiff and the defend-

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ant; the defendant simply wrote a letter to the carriage men (his creditors) in New York.

2. Besides rescinding and tendering back within a reasonable time, this Court hold that the plaintiff must declare *specially*, averring the tort and waiving it, in order to maintain the action of *assumpsit;* citing *Farwell v. Myers*, 59 Mich. 179; *Tregent v. Maybee*, 54 Id. 226.

3. Moreover, the bond sold is a *genuine document*, and the sale of it did not involve any warranty that it was collectible, and there was no false representation or fraud, and consequently the plaintiff took it for what it was worth, and an action in *assumpsit*, like the present, cannot be maintained; citing *White v. Robinson*, 50 Mich. 73; *Otis v. Cullum*, 92 U. S. 447.

4. Where the means of knowledge are at hand, and are equally available to both parties, and the subject of the purchase is present, and alike open to the view of both parties, and the purchaser does not avail himself of the means, or look at the property, or read the bond, he cannot be heard to say that he was deceived by the seller; citing *Picard v. McCormick*, 11 Mich. 68; *Collins v. Jackson*, 54 Id. 186; *Slaughter's Ad'r v. Gerson*, 13 Wall. 379.

5. Even if it had appeared that defendant had falsely alleged that the bond was worth $1,000, he would not be liable unless plaintiff had been fraudulently induced to forbear inquiry; citing *Parker v. Moulton*, 114 Mass. 99; *Simar v. Canaday*, 53 N. Y. 298; *Allison v. Ward*, 63 Mich. 137; *Development Co. v. Silva*, 125 U. S. 259; 3 Wait, Act. & Def. 441, 457.

6. It appears, on cross-examination of the plaintiff, that he knew that there was an office of the Michigan Central Railroad in New York city, and he says himself that any railroad man could tell all about the bond, and, having failed to avail himself of these means of investigation and verification, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentation; citing *Gordon v. Parmelee*, 2 Allen, 214; *Johnson v. Taber*, 10 N. Y. 319; *Slaughter's Ad'r v. Gerson*, 13 Wall. 379; 3 Wait, Act. & Def. 441; and if the fact is one of which the party is equally capable of judging for himself, there can be no misrepresentation; citing *Bank v. Wilkinson*, 3 Sin. & M. 78; *White v. Seaver*, 25 Barb. 225; *Bell v. Byerson*, 11 Iowa, 233; *Fulton v. Hood*, 34 Penn. St. 365.

7. As to cutting off the coupons, that was no evidence of fraud. Each coupon is a piece of negotiable paper capable of separate ownership, and suable without production of, or being interested in, the bond; citing *Kennard v. Cass Co.*, 3 Dill. C. C. R. 149;

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and the presence of the overdue coupons would not dishonor the bond, and the presence or absence is an immaterial circumstance; citing *Cromwell v. County of Sac*, 96 U. S. 51.

CAMPBELL, J. Plaintiff sued defendant for money had and received. The bill of particulars based the demand on a fraudulent sale of a worthless bond of the Michigan Air Line Railroad Company, upon the representation that it was a bond of the Michigan Central Railroad Company. The court below, without assigning any reason, took the case from the jury. The only question is whether the plaintiff showed anything to go to the jury.

As this is not an action for damages for fraud, but is to recover the whole consideration, as obtained from plaintiff for an absolutely worthless bond, we see no reason why the declaration is not good, if any such case was made as is relied on. The plaintiff's showing, for this purpose, must govern, whether contradicted or not. That was to this effect:

November 15, 1887, defendant wrote, requesting one J. W. Renwick, of New York, to take a bond of $1,000 left with him, and cut off and return the past due coupons. He was then to leave it with A. S. Flandrau & Co., who had a small debt against defendant, in order that they might sell it. Some reasons were given why defendant wanted to sell it. He stated he had nine more and thought they could be sold, and asked Renwick simply to say the bond had been left with him for safe-keeping. Renwick had held it since December, 1885. The bond belonged to a series issued by the Michigan Air Line Company, confined to a short section, of 35 miles, between Ridgeway and the Detroit & Milwaukee Railroad. It was issued in 1870, and the mortgage had been foreclosed, and the bonds had no value, or legal efficacy. Flandrau & Co. was a firm name of Keyes & Wilson.

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The bond was handed to Keyes & Wilson. Defendant wrote to them on the day he wrote Renwick, telling them he had requested Renwick to hand them "a M. C. R. R. bond for $1,000," and saying, "if you can sell the same, please do so." This abbreviation, "M. C. R. R.," is the recognized name of the Michigan Central Railroad. That road had become liable on a series of bonds known as "Air Line" bonds, which were at a premium in the market, and the bond in question bore a general resemblance to the Michigan Central bonds. The absence of past-due coupons was some indication that it was not in default. In the letter to Flandrau & Co., defendant made the same statement as to Renwick that he had been buying a house and lot, and was a little hard up. Keyes & Wilson (or Flandrau & Co.) put the bond in the hands of a broker, showing him defendant's letter. There was a few days' delay in finding a purchaser, and on November 22, Keyes & Wilson wrote to defendant that the bond did not seem to be much known in New York, but that they had found a market for it, and could only get 3½ per cent. premium, because it had but two years to run. Defendant telegraphed to close the bargain, and send balance. It was sold to plaintiff, and proceeds accounted for. In answer to defendant's inquiry if more could be sold, he was answered in the negative, and advised to consult his banker, in Detroit. Plaintiff bought it on the representation of the broker that it was a Michigan Central Air Line bond. The testimony was legally sufficient to show that the broker represented defendant, and was informed that the bond was a Michigan Central security. It was a long instrument, which, if read through carefully, would have shown what it was issued for, and that it was on another road.

After the fraud was discovered, various efforts were

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made by Keyes & Wilson, and by plaintiff, to make defendant refund, but he would not do so. Defendant introduced some testimony undertaking to explain how he got the bond, and how he got some others. We need not comment on it, as it might not have impressed the jury as he desired, and it was not for the court to accept, as we can hardly assume it was given any particular form in the decision, which rested either on the form of the pleading or on the absence of actionable fraud.

Unless plaintiff is barred from recovery because he did not read the bond, his testimony makes out a clear case. It is not customary in such transactions for dealers or purchasers to spell through every security offered for sale. If a bond is represented as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and if it is purchased honestly on such a recommendation, it is a fraud to so transfer it. There are many broken or worthless bills circulated which no one ever supposed to be any less fraudulent because genuine. Very few counterfeits would bear close inspection. They are circulated on their general good looks, and it is in that way the fraud is done. If defendant actually cheated plaintiff out of good money for a worthless bond, under circumstances which deceived, and were naturally calculated or intended to deceive, there is no reason why he should not be compelled to refund. We think the plaintiff made out a case for recovery, and had a right to go to the jury. Whether defendant's case was likely to help him, or what view might be taken of the testimony on either side, the jury, under proper instructions, will have to determine.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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JOHN PURDON v. JACOB SELIGMAN.

Sale—Fraudulent concealment—Statute of limitations.

How. Stat. § 8724, which allows suit within two years after the discovery of a cause of action which has been "fraudulently concealed" from the knowledge of the party suing, was not meant to help parties who take no pains to see what is before their eyes.

So held, where a party purchased township bonds showing no authority upon their face for their issue, and the character of which would have been disclosed by examination in the township, which was not made, although the purchaser knew when the first default in the payment of interest arose that the bonds were not as represented, and received strong hints from the county treasurer that should have set him on inquiry, which he neglected to make, and, after waiting over eight years, brought suit to recover the purchase price as money paid without consideration, and sought to avoid the plea of the statute of limitations under the exception to the statute above referred to.

Error to Saginaw. (Gage, J.) Argued November 8 and 12, 1889. Decided November 15, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

William A. Clark (*F. L. Eaton*, of counsel), for appellant, contended:

1. The evidence tended to establish the fraudulent concealment by the defendant from the plaintiff of his guilty complicity in, and fraudulent personal connection with, the illegal issue and consideration of the Billings bonds, and their invalidity and worthlessness; and also that plaintiff failed to discover such facts until within the statutory two years before suit was brought, and it was error to withdraw these questions from the jury; citing *Swimm v. Bush*, 28 Mich. 99; *Persons v. Jones*, 58 Am. Dec. 476 (12 Ga. 371).

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2. "'Tis fraudulent concealment to deceive by trick or artifice," and it is always for the jury to find as to fraud; citing *Kirby Ingersoll*, Har. Ch. 191; *Gaines v. Betts*, 2 Doug. 98; *Picard v. McCormick*, 11 Mich. 75; *Cunningham v. Freeborn*, 11 Wend. 24; and it is for the jury to decide whether the evidence tends to establish a fact; citing *Perrott v. Shearer*, 17 Mich. 54; *Conely v. McDonald*, 40 Id. 150–160; and it was error for the court to decide that by diligent inquiry plaintiff might soon have discovered the defendant's fraud, it being the province of the jury to find when as a *fact* did plaintiff make such discovery; citing How. Stat. § 8724; *Tompkins v. Hollister*, 60 Mich. 479, 480; *Levy v. Shreveport*, 28 Fed. Rep. 210; Angell, Lim. 183–191.

3. The statute was not a bar apparent of the evidence. Plaintiff agreed to take $2,000 for his mortgage, in the four $500 bonds due December 1, 1887, thereby impliedly giving credit until that date to the defendant and the obligor, to pay this purchase price of the mortgage as fixed by their contract, and neither could be sued until then. A credit is implied by taking paper payable on time; citing Angell, Lim. § 95 (notes) §§ 111, 112, 117; *Willson v. Foree*, 6 Johns. 110; *Yule v. Coddington*, 21 Wend. 176; *Ferry v. Ferry*, 2 Cush. 92; *Bank v. Doe*, 19 Vt. 463; *Galloway v. Holmes*, 1 Doug. 330; Whart. Cont. §§ 549, 956, 960.

W. S. Tennant (*Wisner & Draper*, of counsel), for defendant, contended:

1. No one can be allowed to allege a concealment of a cause of action appearing in public records; citing *Robert v. Morrin*, 27 Mich. 307; and plaintiff's mere ignorance that he had a cause of action does not prevent the running of the statute, which is one of repose; citing *Toll v. Wright*, 37 Mich. 103; *O'Dell v. Rogers*, 67 Wis. 173.

CAMPBELL, J. Plaintiff sued defendant for money had and received, the cause of action being the sale to plaintiff of worthless township bonds of Billings, Gladwin county. These were sold to plaintiff in January, 1879. The suit was brought August 1, 1888, nine years and a half thereafter. The defense was the statute of limitations, and this was sought to be avoided on the exception of section 8724, How. Stat., which allows suit within two years after the discovery of a cause of action which

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has been "fraudulently concealed" from the knowledge of the party suing. The alleged fraud consisted in representing that the bonds were good,—as good as the Gladwin county bonds,—and that the town had paid the first coupons, which showed they were good; that plaintiff would only have to present the coupons at the bank in Detroit, when payable, and they would be paid; that, being the first issued, they would be first paid.

The coupons due in January, 1880, were not paid. Plaintiff, January 5, 1880, wrote to the county treasurer of Gladwin, and received back a letter indicating that the paper was poor paper, and that the only way to collect the coupons was to send them to somebody in Saginaw at once, for they were collecting taxes; that there was a good deal of Billings orders, bonds, and coupons out, and the township would bear watching. In May, 1880, he was told no provision had been made for them, but perhaps if he had them around in time he might get part of them the next winter. The case shows no further effort or inquiry until 1887, when casually plaintiff heard defendant had some hand in their concoction.

These bonds show no authority on their face for their issue, and apparently there was no legal authority in fact. Examination in the township would have disclosed their character, but none was made.

There is nothing in the case indicating any attempt by defendant to prevent or postpone inquiry. It was as easy to find out the validity or invalidity of the bonds when the first default arose as at any time thereafter. Plaintiff knew then that they were not as represented, and he received strong hints from the treasurer of Gladwin, who in no way represented the township, that should have set him on inquiry. He entirely neglected to search where the only information was to be found, and defendant threw no obstacle in the way of his doing so.

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How this inaction could, under such circumstances, amount to a concealment of anything it is hard to see. Plaintiff did not, so far as appears, even complain to defendant, or ask information. Had he done so, and had defendant then tried to put him off his guard, the case might possibly have been different. But the statute was not meant to help parties who take no pains to see what is before their eyes.

The judgment for defendant should be affirmed, with costs.

The other Justices concurred.

GEORGE A. MAYWOOD v. WILLIAM M. LOGAN.

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122 333

Landlord and tenant—Fraudulent concealment by landlord of defect in premises—Recoupment—Vexatious appeal.

The concealment by a landlord from a tenant of the polluted condition of the water in a well belonging to the leased premises, after his discovery of the cause, which he failed to remove, and which existed at the time of the leasing, will subject him to damages for all of the injuries naturally following from the use of the water, and the tenant, on discovering the facts, is justified in vacating the premises and terminating the tenancy, if the cause of such pollution cannot be removed; its presence amounting to an eviction, relieving the tenant from the payment of rent after such removal.

So *held*, where on complaint by the tenant of the condition of the water an examination was made by the landlord, who discovered the carcass of a dead dog in the well, which he did not remove, but advised the tenant's wife not to use the water for cooking or drinking purposes, but that it was all right for scrubbing, etc., and such use was made of the water as resulted in sickness in the tenant's family, who removed from the premises on discovering the real facts, and, in a suit to

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recover rent, the tenant sought to recoup the expenses of such sickness, including physician's bills, etc., as damages; and his right to do so is affirmed, and $50 damages awarded against the landlord for a vexatious appeal, the tenant having recovered in the justice's court, and on appeal to the circuit.

Error to Huron. (Beach, J.) Argued November 1, 1889. Decided November 15, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Hiram L. Chipman (*E. F. Bacon,* of counsel), for appellant.

W. T. Bope (*W. T. Mitchell,* of counsel), for defendant.

LONG, J. This is an action of *assumpsit* to recover rent of premises leased to defendant for a dwelling-house and home for his family. Defendant occupied the premises from May 11 to October 13, 1888, under a verbal agreement to pay seven dollars per month. He paid no part of the rent, but on the trial defended upon the ground that the well of water situated there, which his family used, was polluted by the carcass of a dead dog, so that his family became sick, and that he was put to expense in caring for them, for services of physicians, nurses, etc. These damages defendant claimed the right to recoup on the trial.

It appears from the defendant's evidence produced on the trial that shortly after defendant's family, consisting of his wife and two small children, took possession, they noticed something wrong with the water in the well, and complained to the plaintiff. Plaintiff took a man, and caused an examination to be made, and the man going down into the well found therein the putrid carcass of a dead dog, and so rotten that the hair was then coming off. Plaintiff was advised of this fact, but caused the

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pump to be put back, and the covering nailed down, leaving the carcass of the dog in the well. He then stepped to the door, and informed Mrs. Logan, wife of the defendant, that there were some rotten boards in the well, and that she better not use the water for cooking and drinking, but that it was all right for washing and scrubbing. He gave her no intimation of the real situation. The family used the water for three or four days for tea and cooking, and washing potatoes, etc. Within a week or two defendant's family heard rumors that a dog was found dead there, and the defendant went to the plaintiff, and inquired as to the truth of these rumors. The plaintiff denied them, and said there was no dog there, and said the water was all right for washing or purposes of that kind, but probably was not as good as might be for drinking or cooking purposes. The family, after these inquiries, continued the use of the water, the children pumping and drinking it.

The real facts were not discovered until the middle of October, when defendant moved out. During this time the children, who had before been well, became sick with malaria, and nurses and physicians were paid $43 for their care. After the family moved out, and discontinued the use of this water, the children recovered.

The dog was in the well at the time the premises were rented. Before the defendant had arranged for taking possession of the premises he talked to plaintiff about this well, and whether the pump was all right, and was assured that it was. The plaintiff does not deny the finding of the dog there at the time the examination was made, admits that the man told him he thought it was there, but claims that he advised the family not to use the water, and he denies telling the defendant that there was no dog in there. He did not, however, tell the family what he found there. In fact, it appears that

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they were wholly unconscious of its presence in the well, and continued the use of the water, supposing the only reason of the bad smell of the water was from some decayed wood or plank which had fallen in.

The issues thus presented were submitted to the jury; the court directing them that the contract of leasing was not a warranty of the quality of the water contained in the well, nor against the presence of dead animals, but if the plaintiff's attention was called to the bad quality of the water after defendant had gone into possession, and the plaintiff then undertook to make an examination, and found the dog there, and the dog had been there from the commencement of the lease, and plaintiff did not communicate that fact to the defendant or his wife, the defendant would be entitled to recoup his damages.

The jury returned a verdict in favor of defendant for the sum of $9. Plaintiff brings error.

Certain requests were proposed by plaintiff's counsel which the court refused, and we think very properly. We see no error in the charge of which plaintiff can complain.

It is evident from the testimony in the cause that the sickness of defendant's family is directly traceable to this polluted water. The jury, by their verdict, have found that the plaintiff knew of the presence of the dead animal in the well, and that he concealed all traces of it from the defendant and his family. It was there when the tenant's term commenced. When the plaintiff learned that this water was so polluted, his duty towards his tenant was to make the fact known, and, if the fact had become known to the tenant, he would have been justified in removing from the premises, and terminating the tenancy, if the cause could not have been removed. It would have amounted to an eviction, and after which

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the tenant would not be liable for the rent. It was a great wrong for the plaintiff, after discovering the condition of affairs, to conceal the facts, and permit the defendant and his family to continue the use of the water for any purpose, and such concealment amounted to a fraud upon the rights of the tenant. If either party had a right to complain of the charge, it certainly was not the plaintiff.

The case was one, under the circumstances, where the tenant had a right to rely upon the terms of his leasing as a warranty that the water was wholesome. Special inquiry was made as to the condition of the pump in the well. It was evident to the landlord that the tenant intended to use the water for family purposes, and, though he may not have known of its polluted condition at the time of the leasing, he did know that the tenant was attaching importance to this well of water as a part of the premises to be leased, and assurances impliedly were given by him that it was all right. The defendant, however, is not here complaining of the charge.

In the matter of damages the court also limited the recovery in too narrow a compass in stating it could only be for actual damages sustained in procuring nurses and paying the physicians. The plaintiff knew of the presence of the putrid carcass there, and confesses that he did not advise the family of it, and, if defendant's testimony is true, denied that there was any such thing in the water when questioned about it, thereby fraudulently quieting the inquiries of the defendant, and preventing him from making search as to the true cause of the bad odors of the water. These acts of the plaintiff, his examination of the well, and concealment and denial of the cause of the pollution of the water, permitting the defendant and his family to remain there, conclusively show that his understanding was that the property was

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to be put and kept in a healthful condition as a part of his contract to lease, and he therefore became liable to all damages traceable to his acts and misrepresentations. The defendant and his family would have suffered no greater wrong if the plaintiff, when he uncovered the well, and made the examination, had actually polluted the water by placing the animal there. He owed duty to the defendant, as landlord, to see that the premises were in a healthful condition, or at least to disclose any fact within his knowledge which tended to make the premises unhealthful, and not fit for habitation. By his concealment of the pollution of the water, and permitting the family to use it in ignorance of the fact, he made himself liable to damages for all the injuries which would naturally follow. In any view of the case, we think the plaintiff was treated on the trial, and in the charge of the court upon the question of damages, far too leniently.

The cause was tried in the justice's court before a jury, where the defendant prevailed, as well as in the circuit court, where it was again tried by jury. The plaintiff now brings the case to this Court. We view the case as one of vexatious appeal, calling for some redress to the defendant.

The judgment of the court below will be affirmed, with costs, and in addition the defendant will recover the sum of $50 for vexatious appeal.

The other Justices concurred.

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MARY DIEHLMAN v. THE DWELLING-HOUSE INSURANCE COMPANY OF BOSTON, MASS.

Fire insurance—Forfeiture clause—Title to premises—Effect of clerical error in deed.

Where, at the time of issuing a policy of insurance, the insured was in possession of the insured premises (a homestead) under a deed in which the land was incorrectly described, but was correctly described in the policy, which mistake was not discovered until after a loss had occurred, when it was at once corrected by the execution of a quitclaim deed by the original grantor to the insured, such mistake cannot work a forfeiture of the policy, under a clause avoiding it if the interest of the insured is other or less than a perfect legal and equitable title and ownership; the title to the premises being substantially as represented, as in equity the insured had the right to the legal title as she then had the equitable title, and when it was so conveyed it related back to the time of taking possession under the deed containing the wrong description.

Error to Gratiot. (Hart, J.) Argued November 1, 1889. Decided November 15, 1889.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Newell Leonard, for appellant, contended for the doctrine stated in the opinion.

Shepard & Lyon and *T. W. Whitney,* for defendant, contended:

1. The rights of the parties at the time the action was brought will alone be considered. The deed to correct the mistake in the description was not executed until after the suit was brought, and if executed prior thereto it could make no difference.
2. The condition of the title of applicants for insurance is a matter very material to the risk, and the question of materiality is settled by the policy. The insurers chose to consider it mate-

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rial when the contract was made with the insured; citing *Ins. Co. v. Gilbert*, 27 Mich. 429.

3. It cannot be reasonably contended that the plaintiff had the legal and equitable title to the premises. She may have had the whole interest therein, equitably, but she did not have the title. Interest and title are very different things. A complete title to lands consists of the union of possession, right of possession, and right of property; citing 2 Bl. Com. 199. Here, the plaintiff had the possession and the equitable right of property. She did not have the legal right to either the possession or the property. In a court of law she would be considered as having merely the possession without any right. See, also, *Miller v. Ins. Co*, 46 Mich. 463; *Warner v. Assurance Co.*, 21 Conn. 444; May, Ins. § 289.

LONG, J. A policy of insurance was issued to plaintiff by the Dwelling-house Insurance Company, defendant, for the sum of $700, made up as follows: On frame dwelling-house, $300; on furniture, etc., $300; and on frame barn and shed adjoining, the sum of $100. This policy was issued on February 13, 1886, for the term of three years, and a premium of $7 paid. On March 31, 1888, the dwelling-house and a quantity of goods therein covered by said policy were destroyed by fire. After the fire plaintiff made the necessary proofs of loss. An adjuster of the defendant company visited the premises, and after a full and careful examination of the loss and cause of the fire it was agreed between him and the plaintiff that the matter should be adjusted and settled by the payment of $275 on the house, and $45 on the personal effects destroyed, making a total of $320, which the adjuster agreed the company should pay within 90 days from the date of adjustment. The defendant company afterwards refused payment, on the ground that the plaintiff was not the owner of the premises upon which said building and property stood at the time the policy issued, or at the time of the fire. The policy provides that—

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"If the interest of the insured in said property, or any part thereof, now is or shall become any other or less than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing herein, or if the building stands on leased ground, or land of which the assured has not a perfect title, then, and in every such case, this policy shall be void."

It appears that James Paddock and wife made, executed, acknowledged, and delivered a deed to Mary and Martin Diehlman, the husband of the plaintiff, some time prior to the issuing of the policy in this case. The lands and premises are described in the deed as follows:

"Commencing forty-one rods *south* of the south-west corner of the east half of the north-west quarter of section nineteen, township twelve north, range two west; running thence east twenty rods; thence north eight rods; thence west twenty rods; thence south eight rods to the place of beginning," etc.

The correct description would have been:

"Commencing forty-one rods *north* of the south-west quarter," etc.

Afterwards, and in order to put the whole title in Mary Diehlman, she and her husband conveyed the premises to W. H. Schwartz, and Schwartz conveyed back to the plaintiff.

These deeds were all made before the insurance was effected, and all the deeds contained the wrong description. The plaintiff and her husband, however, moved onto and took possession of the premises intended to be conveyed, and were so in possession at the time of the insurance, and the building insured is the one occupied and used as the homestead of the plaintiff and her husband.

The insurance was placed upon the property by Mr. A. R. Garbutt, the duly-authorized agent of the company

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in that county, upon application, and after a view of the premises. This mistake was not discovered in the deed until after the loss of the building, etc., by fire, when Mr. Paddock at once made a quitclaim deed to plaintiff containing the correct description, for the purpose of correcting the mistake in the former deeds. The situation was such that plaintiff would have had the right to the corrected deed, and a court of chancery, upon application, would have corrected it. The whole matter was treated between the parties to the deed as a clerical error, Mr. Paddock making no claim, after the execution and delivery of the deed, to the premises intended to be conveyed, and the parties taking actual possession of the property so intended to be conveyed, and the insurance being placed thereon. The plaintiff had in equity all the title that Paddock had to the property, and in the application the agent of the defendant company correctly described the premises. It does not appear that the risk was in any way increased or made more hazardous. All the parties acted in good faith, and after the fire adjusted the loss, and defendant promised payment. These facts are not disputed.

These circumstances cannot be held to work a forfeiture of the policy. The title to the premises is substantially as represented, as in equity the plaintiff had the right to the legal title as she then had the equitable title, and when it was so conveyed it related back to the time of taking possession under the deed containing the wrong description.

It was agreed in the court below that the loss was adjusted at the sum of $320. The loss occurred March 31, 1888, and the amount would become payable 90 days thereafter by the terms of the policy.

The judgment of the court below must be reversed,

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and judgment entered in this Court for $320, with interest at 6 per cent. from June 30, 1888. Plaintiff will recover the costs of both courts.

The other Justices concurred.

HONORA EVANS v. WILLIAM R. STUHRBERG.

Void note—Fraudulent transfer—Remedy of innocent purchaser.

An *innocent* purchaser of a Bohemian oat note, from whom the holder concealed its true consideration, and to whom he warranted it to be a good note, need not collect it of the maker, though able to do so, but can recover the value of the note, or the money paid for it, from such holder.

Error to Livingston. (Newton, J.) Argued November 5, 1889. Decided November 15, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Rollin H. Person, for appellant, contended:

1. The plantiff being a *bona fide* purchaser, the fact that the note was given for "Bohemian Oats" in no wise affected its validity in her hands; citing *Davis v. Seeley*, 71 Mich. 209.
2. A warranty that a note is good has been held as only a warranty that it is collectible; citing 2 Pars. Notes & B. 141.
3. One can only sue for a wrong from which he has suffered injury; citing *Raynsford v. Phelps*, 49 Mich. 315; *Post v. Campau*, 42 Id. 96.

Dennis Shields and *B. T. O. Clark*, for plaintiff, contended for the doctrine stated in the opinion.

MORSE, J. The plaintiff brought suit in the Livingston

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county circuit court, alleging, in substance, that the defendant sold her a note for $200, executed by one Charles E. Holdridge, representing to the Rev. James G. Doherty, who was acting as her agent in the purchase of the note, that the note was good and collectible, and that Holdridge was worth about $5,000, mentioning the property which said Holdridge owned; that she relied upon such warranty in the purchase of the note; that said note was not good or collectible, and that said Holdridge was irresponsible and financially worthless; that the defendant represented that the note was given for a good, legal, and valuable consideration, when in fact it was a Bohemian oat note, and worthless, and of no value; that she demanded payment of said note from the maker, Holdridge, who refused payment; that afterwards she caused a tender of the note to be made to defendant, and demanded payment of the same, or the refunding of the money paid by her to him for said note, which demand was refused by the defendant.

The defendant pleaded the general issue, and gave notice under said plea that after the note had become due the maker, Holdridge, had offered and tendered the plaintiff as payment or part payment of said note a horse of the value of $200, which plaintiff refused to accept. The plaintiff had judgment in the court below.

The testimony on the part of the plaintiff was to the effect that the defendant offered to sell the note to Mr. Doherty, who was a Catholic priest, then stationed at Brighton. Father Doherty, as he is called in the record, had no money at the time, but thought perhaps plaintiff, who was his housekeeper, might buy the note. He spoke to her about it, and acted as her agent in the transaction. He testified that defendant told him that the note was all right, and represented that Holdridge was good, and that, after all his debts were paid, he would have at least

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$5,000 left, and that the note would not have been purchased except for these representations of defendant. Testimony was also given tending to show that the note was a Bohemian oat note of the usual kind afloat in this State, and accompanied by the usual bond, which had not been performed, and that the representations as to the financial worth of Holdridge were untrue. Plaintiff paid $195 for the note. Defendant admitted that he knew the note was given for Bohemian oats when he sold it to Father Doherty, but testified that Holdridge told him that he went into the transaction for speculation, and that he was going to make money out of it—

"Right immediately to pay it. He said, 'You will certainly have it paid when it is due.'"

This was before he bought the note, and he says:

"I would not have bought the note except for Holdridge's assurances, because it was a Bohemian oat note."

Defendant paid $180 for the note. He also testified that Holdridge told him that he would be pleased to have him buy it, because defendant lived near by, and he could pay it at home. He admits that he told Father Doherty that the note was good, and that Holdridge was good for it. Did not tell him it was a Bohemian oat note. Did not tell him that Holdridge would have $5,000 left when his debts were paid. Evidence was also given on the part of defendant tending to show that the maker of the note was financially responsible for the amount of it. It was shown that plaintiff made no effort to collect the note of Holdridge after the demand and refusal of payment.

The counsel for the defendant assigns as the principal error in the case that the court permitted testimony to be given showing the note to have been given for Bohemian oats, and instructed the jury that if the

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note was a Bohemian oat note it was not a good, but a void, note. It is argued that the plaintiff, having no knowledge that the note was given for Bohemian oats, and purchasing it before due for value, was a *bona fide* holder of the note, and could collect it; that the maker never declined to pay it on the ground that it was a Bohemian oat note, and never claimed that as a defense; that the note was a good note as soon as it passed into plaintiff's hands, and that, therefore, the fact that it was a Bohemian oat note in no wise affected its validity in her hands, and that such fact was entirely immaterial and irrelevant; that, therefore, the case should have been submitted to the jury solely upon the maker's financial responsibility.

We think the circuit judge fairly submitted the case to the jury, and that he did not err in admitting the testimony as to the consideration of the note. The court instructed the jury that if Holdridge told defendant the note was all right, and that he would pay it when it was due, this would estop Holdridge from making any defense to the note, and that it would be a good note so far as its being given for Bohemian grain was concerned. This was as favorable as the defendant could ask, under the law as laid down by this Court in reference to these notes.

This note was void between the parties on the ground of public policy. It was also void and dead in the hands of defendant, as he had knowledge of the fraudulent transaction, unless something had occurred between him and the maker which estopped the latter from pleading its invalidity. Holdridge denied telling defendant that the note was all right, or that he would pay it, and the jury, it is admitted, upon this conflict in the testimony, found against the defendant. Then the case stands like this: When defendant presented this note to Father Doherty he knew it was a void note; that he could not collect it.

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When he told Doherty that the note was good, and thereby induced him to purchase it for plaintiff, he cannot be permitted by the law to take advantage of his own fraud, or thus to evade the law which seeks to discourage and prevent these illegal transactions. If this note was made good in the hands of the plaintiff because she was an innocent purchaser, she was made such innocent purchaser by the fraud of the defendant, who concealed from her not only the original consideration of the note, but warranted it to be a good note when he knew it was not a valid one, except as it might be made so by the success of his deception and falsehood. The law in such a case will not force the plaintiff to collect the note against the maker, though she may be able to do so, nor allow the defendant to reap a profit from his fraud, as well as to galvanize by such fraud a dead note into life. This would not be in accord with that public policy which forbids the contract in its inception, and which endeavors to prevent those engaged in it, or having guilty knowledge of it, to profit thereby.

The commercial law in favor of innocent purchasers was intended for the benefit of the innocent purchaser, and for the security of those handling commercial paper in the due and honest course of business. It was not intended as a shield to those fraudulently putting in circulation illegal or void notes, or passing them upon innocent purchasers by fraudulent or false representations or warranties. And it is much better, if it can be done, that the innocent holder shall recover its value, or the money paid for it, from such false warrantor, than that he shall undertake to recover it from the maker.

There is no error to be found in the record, and the judgment will be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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MARTIN E. ELLIS v. JOHN W. HILTON.

Negligence—Injury to animal—Expense of treatment—Measure of damages.

In a suit to recover damages for negligent injury to a horse, which rendered the animal *entirely worthless*, the plaintiff may recover, in addition to the value of the horse, the amount paid for medical treatment, in *good faith*, and upon a reasonable belief that the horse could be cured or made of some value if properly taken care of, which are questions for the jury; but such recovery must be confined within reasonable bounds, and can never exceed in amount the value of the animal. *Murphy v. McGraw*, 74 Mich. 318; *Watson v. Bridge*, 14 Me. 205.

Error to Grand Traverse. (Ramsdell, J.) Argued November 6, 1889. Decided November 15, 1889.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Pratt & Davis, for appellant, contended for the rule laid down in the opinion, citing the authorities therein cited.

Lorin Roberts (J. R. Adsit, of counsel), for defendant, cited the authorities listed in foot-note to opinion.

LONG, J. This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured.

It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial his counsel stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse

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before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal.

A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him $35 for cure and treatment. On his cross-examination, he also testified that the veterinary said—

"There was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought that there was a chance that he might."

Dr. DeCow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did no know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attemping a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure.[1]

[1] Counsel for defendant cited in support of this ruling *Davidson v. Railroad Co.*, 49 Mich. 431; *Graves v. Moses*, 18 Minn. 335; 2 Thomp. Neg. 1261; *Gillett v. Railroad Co.*, 8 Allen, 560; *Wheeler v Townshend*, 42 Vt. 15; *Streett v. Laumier*, 34 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Olxeson v. Brown*, 41 Wis. 413; *Railroad Co. v. Lewark*, 4 Ind. 471; *Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *Williamson v. Barrett*, 13 Horr. 10.

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Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this $35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation. Counsel for defendant contend that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total.

There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in *Watson v. Bridge*, 14 Me. 205, in which the court says:

"Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen, the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss."

In *Murphy v. McGraw*, 74 Mich. 318 (41 N. W. Rep. 917), it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that, if the plaintiff was led by defendant to keep on trying to cure the horse, the expense thereof would be chargeable to the

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defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

CHAMPLIN and MORSE, JJ., concurred with LONG, J.

SHERWOOD, C. J. I concur in the result.

CAMPBELL, J. I think the rule laid down at the circuit the proper one.

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ANNA DEHRING v. ANDREW W. COMSTOCK ET AL.

Negligence—Question of fact—Conclusiveness of finding by jury.

1. It is negligence to throw bales of hay from the loft of a barn, facing a public street, onto the sidewalk, without first looking into the street and onto the sidewalk, to see if any one is near by, and giving sufficient warning to prevent approach.

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2. Where, in a suit to recover damages for injuries sustained by being hit by a bale of hay thrown from a barn loft onto a public sidewalk, there was no proof that the plaintiff saw other bales fall, or that she was where she could not well avoid seeing them, there can be no proper inference that she saw them, and the court is not called upon to instruct the jury that *if* plaintiff had seen other bales fall she should have been wary of the one causing the injury.

Error to Alpena. (Kelley, J.) Argued November 7, 1889. Decided November 15, 1889.

Negligence case. Defendants bring error. Affirmed. The facts are stated in the opinion.

Turnbull & Dafoe (*Frank Emerick*, of counsel), for appellants, contended:

1. The wagon with the hay on it stood in plain sight. In coming up this sidewalk there were no obstructions. Plaintiff had come up the walk for several blocks; a bale of hay had been thrown down just a short time before the one that struck her; she saw the wagon with bales of hay on it before she got there, but she never looked up; paid no attention to it; kept right on, without using the slightest precaution. Her eye-sight and hearing were all right; it was broad daylight; there was no excuse for her; it was the grossest kind of negligence on her part; citing *Hutchins v. Sleigh Co.*, 61 Mich. 257; *Potter v. Railroad Co.*, 62 Id. 23; *Allen v. Johnston*, 76 Id. 31.

Depew & Rutherford, for plaintiff, contended:

1. When parties on a public street take hay from a barn in the manner shown by the testimony, totally disregarding the safety and lives of passers by, it is hardly necessary to cite authorities to show that such use of the street is negligence; citing *Corrigan v. Union Sugar Refinery*, 98 Mass. 577.
2. The question as to whether plaintiff was warned was one of fact for the jury; citing *Beauchamp v. Mining Co.*, 50 Mich. 163.

CAMPBELL, J. Mrs. Dehring sued defendants for personal injury caused by her being struck by a falling bundle or bale of hay, while she was passing defendants' barn.

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The barn stands facing a public street in Alpena, and is close to the sidewalk. While a wagon, partly loaded with bales of hay, was standing, backed up, close to or partially over the sidewalk, waiting for its load, two men were engaged in the loft, getting the bundles ready. One rolled them forward from the back of the loft, which was not very deep, and of the ordinary height of a barn loft from the ground, and the other put them out through a door or opening, so that they dropped on the sidewalk, without being lowered by tackle. Each bale was compactly put up with wire binding, and weighed about 140 pounds. A man named Truckey put each bale into the wagon, helped by two others.

Plaintiff, who was a washerwoman, living further out, was passing along the sidewalk, and intending to pass the barn. Her story is that she noticed nothing indicating any such danger as would exist from falling articles, and passed on without warning or suspicion of danger, until, just as she got opposite the door, a bale fell on her and threw her down, and temporarily made her senseless. She was helped into the barn, or near it, and soon revived and went home. The testimony on her part indicated that the injury had serious consequences, affecting her arm and her internal organs. The testimony was in direct conflict as to whether she was warned or put on her guard. She testifies positively that she saw and heard nothing which had any tendency to suggest danger. In this she is supported fully by one other witness, and partly by another. On the other hand, Mr. Truckey swore positively to using adequate, and what should have been effective, means to stop her from going forward. In this he is entirely corroborated by the hands helping him.

The jury found in plaintiff's favor. No point of law is taken on the damages. Objection was taken to some

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testimony concerning plaintiff's previous activity and capacity for work, and in the course of it some facts came out about the size of her family. Nothing, however, seems to have been entirely irrelevant; and it does not appear that the court was called on to caution the jury about drawing wrong inferences from it. No exception to the charge covers any such point. The charge was fair and intelligible on the questions raised, and covered all that was essential. The issues were narrow, and involved, as usual, the alleged negligence of defendants and the conduct of plaintiff.

There was evidence of negligence in defendants' servants. The barn faced a public street, not solitary, and, if not constantly frequented, always liable to be so. How common a thing it is to throw hay-bales down from a loft, instead of lowering them with tackle or sliding them down, depends, probably, on circumstances. It is negligence to do this without first looking into the street and sidewalk, to see if any one is near by, and giving sufficient warning to prevent approach, before casting down what would be sure to do great harm to any one hit by it. The men in the loft do not appear to have given warning to passers-by. The question, therefore, became material whether any one else did. The only person claimed to have done so was Truckey; and, if he did what he said he did, there could no doubt of plaintiff's own recklessness in not heeding the warning. But upon this question the defendants presented to the jury a distinct request for a finding. The testimony was in direct conflict, and it was a proper inquiry. The jury found specially that no warning was given by Truckey, and this finding appears to settle that question. We have no power to review the finding, whatever we might think of it.

The only other consideration presented is whether plaint-

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iff ought not to have been on the lookout without warning. The court in the charge presented all the theories in the case to the jury; but it is claimed an instruction should have been given specially, as asked, based on a hypothesis that if she had seen other bales fall she should have been wary of this.

We do not find any testimony that she saw the fall of any other bales. They were not thrown down rapidly, but at intervals of some minutes; and, without some proof that she was where she could not well avoid seeing them, there could be no proper inference that she saw them. We find no evidence that she was where she could have seen them; still less that she probably saw them. The court was not called on to call the jury's attention to what was entirely outside of any testimony. She swears she saw nothing, and there is nothing to the contrary. If defendants' testimony indicates anything, it is that plaintiff was walking along absorbed in thought, and not attentive to her surroundings. Had this been one of the usual dangers of city sidewalks, this, if true, might be open to comment. But there is nothing which would lead any one to suppose that she would not have got along well enough as against any other perils, and her own testimony shows no inattention.

The testimony cannot be harmonized. It is contradictory, both directly and circumstantially. The conflict was between witnesses who were necessarily in fault on one side or the other. The case involved facts, and not much law. The jury must decide such questions, and we find no sufficient ground of error in the law rulings.

The judgment should be affirmed, with costs.

The other Justices concurred.

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JAMES D. TURNBULL v. ANGUS G. BOGGS ET AL.

Sale—Inspection of lumber—Proof of conspiracy to defraud—Estoppel.

1. Plaintiff, a mill-owner, contracted with defendants Holland & Stewart for the sale of 1,700,000 feet of lumber, to be inspected by their co-defendants, and brought suit against *all* of said defendants, claiming a conspiracy on their part to defraud him in the inspection of said lumber, and it is held that the testimony introduced by the plaintiff to show such fraud was competent, and upon its face made out a *prima facie* showing. Said testimony is reviewed in the opinion, to which reference is had.
2. Where a mill owner complained of the inspection of certain cargoes of lumber shipped to the vendees as fraudulent, and accompanied the complaint with the statements of the inspectors, and received and discounted the vendees' notes for the amount shown by the statements, he waived no claim for the lumber fraudulently obtained, if any, through such inspection, having received no more than his own for the lumber which the vendees had confessedly received.

Error to Alpena. (Kelley, J.) Argued November 7, 1889. Decided November 15, 1889.

Case. Defendants bring error. Affirmed. The facts are stated in the opinion.

George H. Sleator (Depew & Rutherford, of counsel), for appellants, contended as stated in the opinion, citing no authorities.

Turnbull & Dafoe, for plaintiff, contended:

1. The receipt and retention of the fruits of a fraud involve a liability to account for it, although the person so benefited was innocent of personal participation in the wrong; citing *Elwell v. Chamberlin,* 31 N. Y. 611; *Garner v. Mangam,* 93 Id. 643; *Krumm v. Beach,* 96 Id. 398; *Dunn v. Railroad Co.,* 43 Conn. 434; *Hopkins v. Snedaker,* 71 Ill. 449; Cooley, Torts, 147 (note);

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and it is elementary that, if the principal retains the fruits of the fraud of his agent, he is liable for the agent's frauds; citing Evans, Ag. (Elwell's ed.) 440; *Bass v. Railway Co.*, 42 Wis. 667.

2. Where a person is defrauded in a contract or transaction by another, he can keep what he gets, affirm the contract, and sue for fraud, and his measure of damages will be what he was defrauded out of; citing *Jewett v. Petit*, 4 Mich. 513; *Walsh v. Sisson*, 49 Id. 424; *Pangborn v. Ins. Co.*, 67 Id. 683; Cooley, Torts, 504.

MORSE, J. The defendants Boggs are lumber inspectors at Alpena, Mich., and the Stewarts and Holland are members of the firm of Holland & Stewart, of Buffalo, N. Y. The plaintiff, who was the owner of, and operating, a saw-mill at the mouth of Long Lake creek, in Alpena county, contracted, on July 16, 1888, with Holland & Stewart to sell them about 1,700,000 feet of lumber. The memorandum of the contract was as follows:

"The said Turnbull sells to said Stewart & Holland all the 4–4, 5–4, 6–4, and 8–4, about 1,700 M., at $7.50 for S. culls, $15.00 for com., and $35 for uppers, and 150,000 M. bill stuff, and 70,000 M. timber, at $8.00 per thousand, on rail of vessel at Turnbull's docks, Alpena county. Terms, 90 days from shipment, or 2 per cent. off for cash. All to be shipped before October 1, 1888. Boggs Bros. to inspect said lumber. Mill culls, six dollars. Balance of logs, if cut so as to ship this year, at same price. J. D. TURNBULL.

"*Dated July* 16, 1888. HOLLAND & STEWART."

About August 6, of the same year, Holland & Stewart sent two vessels to plaintiff's docks, and there was loaded about 625,000 feet, which was measured and inspected by Boggs Bros. When the inspection bills were handed to him, Turnbull found fault with them and told Boggs it was not right. August 7 plaintiff sent a statement, as per Boggs inspection, to Holland & Stewart, requesting them to send notes for the amount of such shipment. He said nothing about the inspection in this letter. The

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notes were sent and receipted for by plaintiff, and discounted by him. They were paid at maturity. About August 16, Holland & Stewart sent two more vessels to plaintiff's docks, and they were loaded with about 600,000 feet, measured and inspected by Boggs Bros., or men in their employ, and under their supervision. Turnbull again complained of the inspection, and wrote to Holland & Stewart on August 18 that he was not satisfied with the inspection, and that Boggs and his men were either incompetent or dishonest; that they neither gave the right quantity or quality of lumber; and requested them, as "square business men," to let some one else inspect the balance; saying to them:

"You may name any four first-class inspectors, of Alpena, and I will select two of the four, or I will name four, and you may select the two. All I want is an honest measurement and inspection. I am not getting it."

Holland & Stewart replied August 21 that they would be in Alpena before the next shipment, and see plaintiff personally about the matter; that they would have an inspection made of the lumber last shipped, and, if they found Boggs' inspection right, should not care to change them; that they would have the lumber remeasured and reinspected, and find out for themselves whether there was any foundation to plaintiff's charges.

Plaintiff afterwards received notes for this shipment, which he discounted, and which were paid at maturity by Holland & Stewart. Defendants Holland & Stewart refused to change inspectors, and Turnbull refused to allow them to take away any more lumber.

This suit is brought, claiming a conspiracy of the defendants to defraud the plaintiff. It is alleged by plaintiff that Holland & Stewart falsely and fraudulently represented to him that Boggs Bros. were competent, fair, honest, and trustworthy inspectors of lumber, for the

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express purpose of inducing him to consent that Boggs Bros. should inspect said lumber, and that, relying upon such representation, he was induced to so consent, and that the said Holland & Stewart so induced him to consent in order that they might cheat and defraud him in the measurement and inspection of said lumber; that said Boggs Bros. did not inspect the lumber fairly and honestly, but dishonestly, and cheated and defrauded plaintiff out of at least 100,000 feet of lumber in the measurement thereof, and also cheated and defrauded plaintiff in the inspection of said lumber, and in the grading thereof, placing what should have been uppers into common, and classing what should have been common as shipping culls; that their inspection only allowed plaintiff 27,000 feet of good or clear, and 800,000 feet of common, lumber, when there should have been at least 60,000 feet of good, and 1,000,000 feet of common, lumber, if the same had been fairly and honestly inspected; that said Boggs Bros. were employed by Holland & Stewart to inspect said lumber, and to cheat and defraud said plaintiff as aforesaid in the inspection and measurement of the same, and that they have cheated and defrauded him out of at least 30,000 feet of good lumber, and 300,000 feet of common lumber.

This claim of fraud, and damage thereby to plaintiff, was attempted to be shown as follows:

1. By the representations and efforts of Holland & Stewart to obtain plaintiff's consent that the lumber should be inspected by Boggs Bros.

2. By a comparison between the inspection made by Boggs Bros. and that of other competent and honest inspectors, who inspected the lumber left on the docks, and which was claimed to be of the same kind and quality generally as the lumber shipped by Holland & Stewart.

3. By the fact that Holland & Stewart refused to change inspectors after they were made acquainted with the alleged fraud of Boggs Bros.

4. That Boggs Bros. were requested by plaintiff to

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employ one Johnson to assist in the inspection and measurement of the lumber, who was a competent and honest inspector at Alpena; that plaintiff offered to pay said Johnson for his work, if Boggs Bros. would employ him; that thay promised to do so, but when the inspection of the last shipment was made they claimed that Johnson was drunk as the reason why they did not bring him out to help inspect the lumber. Plaintiff saw Johnson same day, and testified that Johnson was sober.

5. Counting of the courses of the lumber as it was piled on the docks before it was shipped, and estimates made therefrom.

The testimony in behalf of plaintiff showed that Boggs Bros' inspection ran 32½ per cent. to shipping culls, while that of the other inspectors only made about 21 per cent. of such culls; and that between competent and honest inspectors there ought not to be a variance of more than from 1 to 3 per cent. in the inspection of the same lumber.

The defendant denied that there were any representations made to plaintiff, or any effort of any kind, to induce him to consent to the inspection by Boggs Bros. Alleged that they were chosen as much by his suggestion as that of Holland & Stewart. They insisted that there was no fraud in the inspection, and no conspiracy between them to cheat or defraud plaintiff, and introduced testimony tending to show that the inspection and measurement were competently, fairly, and honestly made.

They also put in the evidence of inspectors tending to show that the matter of grading the lumber was one depending a great deal upon the judgment of the inspector; that the line between good and common, and between common and shipping culls, in many boards was very close, and that competent inspectors might fairly and honestly differ quite a large per cent.—from 3 to 20 per cent.—in such grading; and that there was a great difference frequently between the inspections, made at

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different times, of lumber cut from what was supposed to be the same kind of logs. One inspector testified that he had known his own inspection in the forenoon to vary from his inspection in the afternoon of the same day 10 to 15 per cent. in lumber supposed to be cut from the same logs.

Several prominent and extensive lumbermen in Alpena who had employed Boggs Bros. testified that they, and the men in their employ, were careful, competent, and honest lumber inspectors. Holland & Stewart also testified that they sold the lumber to their customers upon the inspection and measurement made by Boggs Bros. A Buffalo lumber inspector testified that he inspected one of the first cargoes shipped, when it arrived at Buffalo, and made the good and common lumber less than shown by Boggs' inspection, the whole number of feet being about the same. He did not see or know of Boggs' inspection until after he made his own.

The jury returned a verdict in favor of the plaintiff for the sum of $1,000.

The charge of the court was eminently clear and fair, and, as admitted by defendants' counsel, quite favorable to the defendants, as far as it went, in defining the law of the case. But it is claimed that the case should not have been submitted to the jury at all; that there was absolutely no proof of any fraud, and the verdict should have been directed in defendants' favor. If a fraud was perpetrated upon plaintiff, as claimed by him, there would be necessarily no other way of proving it except in the manner in which plaintiff sought to establish it. It would not be likely that plaintiff could produce any direct evidence of the fraud, or the conspiracy by which it was effected. He would in most cases be unable to prove that Holland & Stewart and Boggs Bros. met together and agreed upon and marked out the course of

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the fraud, by any one who heard them talking of the plan. This would be a secret undertaking between them, which must be discovered, if it all, by circumstances, and by the results in the case. It could have been more satisfactorily established if Turnbull could have remeasured and inspected the lumber shipped, but this he could not do without going to Buffalo, and perhaps not then. He took the best method to discover the cheat which was otherwise available to him.

It is contended that he should have demanded a reinspection at Buffalo, which he did not do. But he notified Holland & Stewart of his claim of fraud after the second cargoes were shipped, and they promised a remeasurement and reinspection of such cargoes. They wrote him:

'We, however, will be in Alpena before that time, and will call and see you personally in reference to what you state in your letter. This will give us a chance in the mean time to inspect these two barges, on which you make so much complaint; and if we find that Messrs. Boggs' inspection is right, then we shall not care to change them. We, however, will be able to know better about ten days after the barges get here, as we shall have this lot of yours all inspected and remeasured by that time. I think you will see the justice of this. The only complaints we have ever had about any incompetency of the inspectors have always been from men who are not strictly in the lumber business; but, as you have made a direct charge against these inspectors, we will find out for ourselves, as we can easily see whether there is any foundation or truth in your charges."

But their own testimony shows that they never remeasured or inspected any of the lumber except one of the first cargoes; and it is claimed by Turnbull that the first cargoes were about 3 per cent. nearer correct than the last.

The testimony introduced by the plaintiff to show fraud was competent, and upon its face made a *prima*

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facie showing. Although, upon the whole case, we might not have reached the same result as the jury did, the facts and circumstances were properly submitted to them, and we cannot disturb their finding.

It is also claimed that the plaintiff was estopped by his conduct in the case from recovering in this action, because he sent the statements of the inspection to Holland & Stewart, and received his pay upon them. This did not estop him. He made his claim of fraud seasonably enough. He received no more than his own when he took and discounted the notes for the lumber which Holland & Stewart confessedly had received. In receiving such payment he waived no claim for the lumber they had fraudulently obtained, if any, and neither of the defendants were induced by his acts to do anything which would authorize them to claim the benefit of an estoppel against their fraud, if any fraud was committed.

We have been unable to find any error in the record, and the judgment is affirmed, with costs.

The other Justices concurred.

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MARTHA SEBERT v. THE CITY OF ALPENA.

Municipal corporations—Highways—Construction of—Negligence.

1. The statute making it the duty of cities to keep in reasonable repair all public streets open to public travel within their jurisdiction, and under their care and control, applies to defects in construction as well as to neglect to repair when the street is unsafe (*Carver v. Plank-road Co.*, 61 Mich. 590); and the safety required by the statute is secured to travelers as well by night

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as by day, and the dangers surrounding them in the darkness of the night are conditions that should be taken into consideration by the authorities whose duty it is to construct and keep in repair the road-way.[1]

2. It is the road-way that the statute requires to be kept in a reasonably safe condition; and whether such way requires the use of the entire width of the street must depend entirely upon the necessities of travel in any given case, and of this the authorities of a township or city must take notice, at their peril.

Error to Alpena. (Kelley, J.) Argued November 7, 1889. Decided November 15, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Depew & Rutherford (*George H. Sleator*, of counsel), for appellant, contended:

1. No one can claim that the statute of 1887 required the defendant to keep the street cleared out and "in reasonable repair, and in a condition reasonably safe and fit for travel" over its entire width; citing *Keyes v. Marcellus*, 50 Mich. 439; *McArthur v. Saginaw*, 58 Id. 357; *Agnew v. Corunna*, 55 Id. 428.

Turnbull v. Dafoe, for plaintiff.

SHERWOOD, C. J. The plaintiff in this case brought her suit against the city of Alpena to recover for an injury received by being thrown from a wagon which collided with a stump standing so near the traveled part of Chisholm street in said city as to make traveling by it in the night-time dangerous, and which street it was the duty of the city to keep and maintain in a reasonably safe condition for traveling with vehicles at that time. She claims the city negligently failed to discharge such duty, and by reason thereof she was injured, and without any fault on her part. On the trial in the

[1] See *Malloy v. Township of Walker*, 77 Mich. 448.

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circuit the plaintiff recovered a verdict of $500. The city brings error.

The record, as presented, shows that Chisholm street is one of the largely traveled thoroughfares in the city; that the plaintiff, on November 24, 1887, and about 10 o'clock in the evening, was passing over said street with a horse and buggy driven by a Mr. Wentworth. The night was dark and stormy; and, when they came to the place where the stump stood it was struck by the carriage with such force as to throw both plaintiff and Mr. Wentworth out upon the ground, she striking upon her head and shoulders, in such manner as to cause serious injury to her shoulder and arm, and from which she has not yet been able to recover. It is for this injury to her person that she now brings her action. The stump was a large one, about four feet high and two to three feet through, and had stood where it did for more than ten years immediately preceding the accident; and the principal question in the case was whether it stood so near the road in the highway as to make it dangerous to travel in the night-time, when it was dark.

It is contended by defendant's counsel that the stump was not such a defect as is contemplated by our statute[1] in requiring cities to keep streets in a reasonably safe condition for travel; that the existence of the stump in the highway where it stood, if a defect or obstruction at all, was one pertaining to the construction of the road, which was not covered by the statute. In this position, I think counsel for the defendant are incorrect. The statute applies to defects in construction as well as to neglect to repair when the road is unsafe; and such has been the previous ruling of this Court (*Carver v. Plank-road Co.*, 61 Mich. 590, 28 N. W. Rep. 721), and that the safety required by the statute is secured to travelers

[1] Laws of 1887, Act No. 264.

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as well by night as by day, and the dangers surrounding the traveler in the darkness of night are conditions that should be taken into consideration by the authorities whose duty it is to construct and keep in repair the road-way. It is the road-way that the statute requires to be kept in a reasonably safe condition; and whether such way requires the use of the entire width of the street must depend entirely upon the necessities of travel in any given case, and of this the authorities of a township or a city must take notice, at their peril.

There was some considerable conflict in the testimony of the witnesses as to the particular location of the stump, and the proximity of the road-way thereto. The question of its location and that of the way, and its dangerous condition, were submitted to the jury, under proper instructions from the court, and the jury found for the plaintiff; and I find nothing in the record requiring a different conclusion, and the judgment should be affirmed.

The other Justices concurred.

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CHARLES KNORR AND CHARLES STEFFENS v. ARTHUR L. CANFIELD, CIRCUIT JUDGE OF MACOMB COUNTY.

Jurisdiction—Costs—Highways.

1. The proviso in How. Stat. § 6815, that justices of the peace may have jurisdiction in actions for damages resulting from obstructions to highways, confers, at best, only a *concurrent* jurisdiction with the circuit court.

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2. Where, in a suit in the circuit court for damages for obstructing a highway, the only matter in issue by the proofs is whether or not the particular spot where the obstruction was placed was in the public highway as constituted by user, which question is determined in favor of the plaintiff, he is entitled to costs under How. Stat. § 8964, although the judgment is less than $100.

Mandamus. Submitted November 8, 1889. Decided November 15, 1889.

Relators apply for *mandamus* to compel respondent to vacate a judgment for costs in favor of plaintiff in an action for damages for obstructing a highway, where the judgment was less than $100. The facts are stated in the opinion.

Edgar Weeks (Eldredge & Spier, of counsel), for relators.

Lungershausen & Erskine, for respondent.

MORSE, J. The only question here is one of costs.

One William Walvin sued the relators in the circuit court of Macomb county, declaring in trespass on the case, and alleging, in substance, that he was injured by the negligence of the relators in incumbering a certain public highway with saw-logs, bolts, staves, and other materials, into and against which his horse ran, throwing him out of his cart. The highway was described as the—

"Town-line road between the townships of Erin and Clinton, in said county of Macomb, in the vicinity of the village of Fraser, in said township of Erin."

And it was alleged that these incumbrances encroached upon the highway, and were wrongfully placed therein by the relators, the defendants in said suit. The defendants pleaded the general issue.

In his return to the order to show cause the circuit

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judge says that the highway was sought to be established by the plaintiff by testimony tending to show that at the point where the logs were piled there was a highway by user and common reputation, and the defendants in rebuttal thereof introduced evidence tending to show that at this point no right of way or easement existed in favor of the plaintiff or the public, but that the same had been used by the defendants and their grantors for over 20 years for the piling of logs. It is admitted that there was no dispute upon the trial as to the location of the logs, the point where they were piled being agreed upon. The dispute was whether this point was within or without the highway. The jury found for the plaintiff, and adjudged his damages at $35. Both parties claimed costs. The circuit judge gave them to plaintiff. We are asked to compel by *mandamus* a vacation of this judgment as to costs, and to issue a further command that judgment in this regard be entered in favor of the defendants.

The issue of the writ is claimed for the reason that the verdict of the jury was for less than $100. It is contended that the action was clearly within the exclusive jurisdiction of a justice of the peace, under sections 6814, 6815, How. Stat. Section 6814 provides that justices of the peace shall have exclusive jurisdiction of all civil cases wherein the debt or damages do not exceed $100, except as provided in section 6815, which reads as follows:

"No justice of the peace shall have cognizance of real actions, actions for a disturbance of a right of way or other easement. * * * Nor where the title to real estate shall come in question, except as hereinafter mentioned: *Provided,* That justices of the peace may have jurisdiction in actions for damages resulting from obstructions to highways, subject to the restrictions prescribed in section one (§ 6814) of this chapter."

In our opinion this proviso in section 6815 confers, at

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best, only a concurrent jurisdiction with the circuit court upon justices of the peace in actions for damages resulting from obstructions to highways, which jurisdiction such justices *may* take.

Under section 8964, How. Stat., the plaintiff is entitled to costs when the title to lands or right of way or to any easement in lands shall have been put in issue by the pleadings, or shall have come in question on the trial of the cause. It is clear in the present case that the only matter in issue by the proofs was whether or not the particular place where the logs were piled was in the public highway as constituted by user, and this was determined, not by the location of the logs, but as to where the highway was located and established. The question submitted to the jury, in effect, was:

"Did the highway, as used and traveled by the public for a sufficient number of years to constitute the land thus used a highway by user, take in the spot where these logs were piled, or was such place outside the limits of such highway?"

This question was answered by the jury in their verdict. They found the logs in the highway.

The writ will be denied, with costs.

The other Justices concurred.

SARAH T. EMMONS v. FREDERICK VAN ZEE ET AL.

Foreclosure by advertisement—Irregularities—Bill to redeem—Laches.

1. We have enjoined foreclosure sales by advertisement upon tender of the amount due, *not* including any attorney fee; but we have never held such a foreclosure void because of including the attorney fee in the sum for which the land was sold.

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2. In this case a delay of fourteen years in taking steps to redeem from a statutory foreclosure, which is claimed to be void by reason of including in the sum the land sold for an attorney fee and some unpaid taxes, is held to amount to gross laches, defeating complainant's right to redeem.

Appeal from Wayne. (Hosmer, J.) Argued November 8, 1889. Decided November 15, 1889.

Bill to foreclose a mortgage and to redeem a prior mortgage. Defendant Van Zee appeals from decree granting relief prayed. Decree reversed in part, and bill dismissed as to defendant Van Zee. The facts are stated in the opinion.

William H. Wells, for complainant.

Volney H. Lockwood and *A. M. Stearns,* for defendant Van Zee.

MORSE, J. The bill in this case is filed to foreclose a mortgage, executed May 10, 1871, by the defendants Sowden, husband and wife, upon certain lands in Wayne and Kalamazoo counties, for the sum of $13,500, and to redeem a prior mortgage on the Kalamazoo lands. The mortgage was given to George M. Pettee, and, on the day it was executed, assigned by him to Halmer H. Emmons, of Detroit, who in his will bequeathed the same to complainant. When this mortgage was made there was in existence upon the Kalamazoo lands a prior mortgage for $840, given by said George and Ann Sowden to one Martin Hydenburk, dated February 25, 1869. December 8, 1870, this mortgage was foreclosed by advertisement, and the premises bid in by Hydenburk for $794.50. December 9, 1871, Hydenburk quitclaimed the lands to Isaac A. Brown. Brown quitclaimed to John Kendall, December 6, 1872, and Kendall conveyed the lands back to Brown, May 27, 1884. June 2, 1884, Brown and wife

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conveyed the premises by warranty deed to the defendant Frederick Van Zee.

The Wayne county circuit court, in chancery, decreed that there was due upon complainant's mortgage, May 14, 1889, the sum of $20,192.65, and in respect to the Wayne county lands the decree was in the usual form of a foreclosure decree. It also determined that the complainant was entitled to make payment of the prior mortgage on the Kalamazoo lands, holding the foreclosure of the same to have been void. The amount due upon said mortgage was found to be $703.43, with interest at 7 per cent. from December 8, 1870. It was decreed that if this amount was paid to defendant Van Zee, the only one defending, within 60 days after June 4, 1889, the foreclosure proceedings by advertisement should be null and void, but otherwise to stand affirmed. From this decree Van Zee appeals.

It is contended that the foreclosure by advertisement was not only irregular, but void, not only as against the mortgagor, Sowden, but against the complainant, who had a right of redemption as second mortgagee, because in such foreclosure an attorney fee of $25 and unpaid taxes to the amount of $27.01 were included in the sum for which the premises were sold. The complainant's husband became the owner of the mortgage being foreclosed in this suit the day it was made, in May, 1871. At that time the records gave him full information of the prior mortgage, and that the premises had been sold and bid in by Hydenburk, the mortgagee, and that the time of redemption would expire December 9, 1871. Fourteen years elapsed from that date before any attempt was made to redeem from this mortgage sale, or any proceedings taken to attack its validity. During this time the premises have passed through three other persons to

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the defendant Van Zee, who has been in possession ever since the deed from Brown to him.

To excuse this long neglect and laches the complainant claims the record shows that Brown took his deed from Hydenburk under an arrangement with the mortgagor, Sowden, by which Brown agreed to hold the title in Sowden's interest; that Brown did so and subsequently conveyed to Kendall, who was a brother-in-law of Sowden, and who was to carry the title for the latter until he was able to redeem, and thus save the land; that until Brown deeded to Van Zee, as Kendall's conveyance back to Brown was not recorded until Van Zee received his title, no equities grew up as against complainant, the title being held in Sowden's interest; and that but little improvements have been made since Van Zee bought it, and that the possession of the premises has been worth as much to Van Zee as he has expended on them.

We do not think the record bears out this claim, Brown testifies that he purchased the land with his own money; that he promised Sowden that he would buy it, and give him six months in which to redeem it; that at the time he sold to Kendall he did not suppose that Sowden had any interest in the land, or that Kendall was buying in Sowden's interest; that when he bought back of Kendall he paid him $1,450, and sold to Van Zee for $1,650. Sowden did not redeem, and it can hardly be said from the whole record that the title was ever held in his interest more than six months. But if it were, we fail to see how it can effect the laches of complainant as against Van Zee, who is admitted to be a good-faith purchaser. As far as the mortgagor (Sowden) is concerned, if the arrangement with Brown was, as he claims, that Brown should pay the full face of Hydenburk's bid for the land, and the attorney fee and the

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unpaid taxes were included in such bid, Sowden, by so doing, acquiesced in the payment of the attorney fee and taxes to Hydenburk, as it is not claimed that he did not know they were included; and if he had carried out the arrangement with Brown by redeeming the premises, the complainant would not have been harmed by the payment of these items. When Sowden failed to redeem, the complainant was not authorized to lie by and remain silent as to the validity of this mortgage sale, and then, after the lapse of all these years, and when the rights of a third person, acknowledged to be a purchaser in good faith, have intervened, come into a court of equity and demand a right to redeem from this mortgage sale, because of these two items included in the amount realized by Hydenburk from such sale, and to oust such innocent purchaser from the possession of the premises, or force him to redeem from this mortgage of long standing, the principal of which has nearly doubled.

We have enjoined foreclosure sales by advertisement upon tender of the amount due, not including any attorney fee; but we have never held a mortgage foreclosure void because of the insertion of the attorney fee in the sum for which the land was sold. Nor is the mortgage sale necessarily invalid on this account, if the attorney fee was claimed in good faith. See *Millard v. Truax*, 50 Mich. 343 (15 N. W. Rep. 501). An opportunity was given to redeem in that case, because the fee was considered excessive, it being nearly 25 per centum of the amount of the mortgage, and for other reasons therein stated, and no such laches existed in that case as is shown here.

The same may be said of the unpaid taxes of 1869, which it is claimed were included in the sale. The tax was due and unpaid. Brown redeemed the premises from the lien of these taxes, and thinks it was deducted from

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what he paid Hydenburk for the land, as he was to pay, and did pay, him the amount of money and interest paid by Hydenburk on his bid. There is no showing that the taxes were not a valid lien on the land. They have been paid, and not by the complainant. She cannot complain of such payment, and it is difficult to perceive how she has been harmed by their being included in the amount bid on the sale.

There can be upon this record no charge of bad faith made against Hydenburk for including either of the items in the amount claimed to be due on his mortgage. It was an irregularity which certainly did not void the sale, and which could only be a reason for redemption where there was no laches in moving for such redemption. Here there has been gross laches,—an inexcusable delay,—which must be held to defeat complainant's right to redeem.

The decree of the court below is reversed and set aside so far as it affects or concerns the Kalamazoo lands, and the complainant's bill must be dismissed as against the defendant Van Zee, with costs of both courts.

The other Justices concurred.

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CHARLES T. FLETCHER ET AL. v. MYRON A. MORRELL.

Sheriffs and ex-sheriffs—Right to execute process—Fees.

1. It is the duty of an ex-sheriff who has attached property in his custody, after an execution has been issued in the suit, to expose such property to the sheriff, when requested by him, in order that it may be taken in execution and sold to satisfy the same.

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2. If an ex-sheriff has any valid charges as custodian, he should make out his bill of items, and present it to the clerk or other taxing officer for taxation, or, if they are *not* statutory fees, he should apply to the court for such allowance upon motion, and notice to the parties interested. He has no right arbitrarily to fix his own price, and retain the property until paid.

3. The right of an ex-sheriff to execute process until the service upon him of the clerk's certificate required by How. Stat. § 597, showing that his successor has qualified and given the security required by law, exists only as to such process as he has in his hands, and which he is required by How. Stat. § 599, to deliver to his successor upon service of such certificate.

4. The following propositions are summarized from the opinion of Mr. Justice CHAMPLIN:

a—Whether a sheriff can be allowed for custody of goods levied upon, query? *Bank v. Judge*, 54 Mich. 305.[1]

b—How. Stat. §§ 587, 599, 601, deal with process, and not with property, in the hands of the ex-sheriff.

c—The requirement that if the sheriff whose term of office is about to expire has commenced the service of process he shall complete the same, is to prevent a divided responsibility in the execution of process.

d—A writ of attachment is *mesne* process, and must be returned by the officer, and when so returned remains in the custody of the clerk as a part of the files in the case. The property attached remains in the custody of the officer who served the writ until the suit is disposed of, unless bonded or the attachment is dissolved.

e—If judgment is entered for plaintiff in attachment, execution is to issue thereon to the sheriff or other proper officer of the county, but there is no authority in the law for issuing an execution or other process to a sheriff whose term of office has expired, and whose right to execute process has ceased by the election and qualification of his successor.

Mandamus. Submitted November 13, 1889. Granted November 15, 1889.

[1] See *Fletcher v. Kalkaska Circuit Judge*, 45 N. W. Rep. 641, where, on an application by the relators in this case for *mandamus* directing the circuit judge to set aside an order allowing the ex-sheriff $130 for his services as custodian of the attached goods, the writ is granted,—the Court holding that, the ex-sheriff having been paid his statutory fees and expenses in full, the order of the circuit judge allowing additional compensation is illegal and void.

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Relators apply for *mandamus* requiring respondent as ex-sheriff to turn over to his successor goods taken by him during his term of office under an attachment. The facts are stated in the opinion.

Charles B. Lothrop, for relators.

W. D. Totten and *J. L. Boyd,* for respondent.

CHAMPLIN, J. Three questions are presented on this motion. They arise out of the following facts: Morrell, being sheriff of Kalkaska county, attached and took into his possession certain goods and chattels, in which writ the relators were plaintiffs. The sheriff's term of office expired December 31, 1888. Judgment in the attachment suit was recovered in August, 1889. One John E. Rainbow was elected to succeed Morrell as sheriff, and after judgment was rendered, and execution was issued directed to the sheriff of the county of Kalkaska, Sheriff Rainbow demanded the property of the ex-sheriff, who refused to deliver it, claiming that he was entitled to compensation as custodian, for which he charged $400, being for 400 days at $1 a day; and also that having served the attachment, and levied upon property in pursuance thereof, he is lawfully entitled to make sale thereof under the judgment, and that the execution should have been issued to him for that purpose.

If the ex-sheriff has no right to retain possession of the property for the purpose of sale under the final process, he would have no right to retain it because his charges for custody were not first paid. If he has any valid charges as custodian, he should make out his bill of items, and present it to the clerk or other taxing officer for taxation, or, if there are no fees allowed by statute, he should apply to the court for such allowance upon notice and motion to the parties interested. He

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has no right arbitrarily to fix his own price, and retain the property or money received on sale. He can only retain his fees allowed by law. But we do not decide that a sheriff can be allowed for custody of goods levied upon, as it is not necessary to determine that question now. *Genesee Co. Savings Bank v. Judge*, 54 Mich. 305 (20 N. W. Rep. 53).

Whether the respondent has the right to complete the service of the attachment by a sale of the property attached depends upon a proper construction of the statutes. Section 7990, How. Stat., provides that the writ of attachment shall command the sheriff to attach so much of the goods, etc., as will be sufficient to satisfy the plaintiff's demand, and safely keep the same to satisfy any judgment that may be recovered in such attachment. Section 7998 enacts that the property attached shall remain in the custody of the officer serving the attachment, unless bonded as prescribed by the statute. Section 8007 provides:

"When a copy of the attachment shall have been personally served on the defendant [which was this case], * * * judgment shall be rendered, and execution shall issue thereon, in the same manner, and with the like effect, as in a suit commenced by summons, in which the summons shall have been returned personally served, except that by virtue of such execution the officer to whom the same shall be directed and delivered may sell any property attached in the suit, and remaining in the hands of the officer who served the attachment, wherever the same may be in this State."

The statutes also provide that, upon the election of a new sheriff, the former sheriff shall deliver to his successor—

"All executions, attachments, and final process then in his hands, except such as the said former sheriff shall have executed, or shall have begun to execute, by the col-

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lection of money thereon, or by a levy on property in pursuance thereof." How. Stat. § 599, subd. 5.

Section 601 declares that,—

"Notwithstanding the election of a new sheriff, the former sheriff shall return in his own name all writs of *capias ad respondendum*, all other original process, all attachments, and all executions which he shall have fully executed, and shall proceed to complete the execution of all final process and attachments which he shall have begun to execute by a collection of money thereon, or by a levy on property in pursuance thereof."

It is also enacted by section 587 that—

"Sheriffs and their deputies may execute all such process as shall be in their hands at the expiration of the term for which such sheriffs were elected, or at the time of their removal from office."

The three sections last above cited deal with process, and not with property, in the hands of the ex-sheriff. If the sheriff whose time is about to expire has commenced the service of process, the law requires that he should complete such service. This is to prevent a divided responsibility in the execution of process. It may happen that a writ of attachment may be issued during the last days of the sheriff's expiring term, and be made returnable at a time when his successor has entered upon the duties of his office, in which case the statute provides that, if the ex-sheriff has commenced the service of the writ by a levy upon the property, he may go on and complete the service of the writ according to its commands, and make return thereof.

A writ of attachment is *mesne* process, and must be returned by the officer, and when so returned remains in the custody of the clerk as a part of the files in the case. The property attached remains in the custody of the sheriff or officer who served the writ until the suit is disposed of, unless bonded or the attachment is dissolved.

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If judgment is entered for the plaintiff, then execution is to issue thereon. There is no authority in the law for issuing an execution or other process to a sheriff whose term of office has expired, and whose right to execute process has ceased by the election and qualification of his successor. The statute requires executions to issue to the sheriff or other proper officer of any county in this State. How. Stat. § 7664.

The execution in this case was properly issued to the sheriff of the county. It is the duty of an ex-sheriff, who has property in his custody by virtue of having attached it, after an execution has been issued in the suit, to expose such property to the sheriff, when requested by him, in order that such goods may be taken in execution and sold to satisfy the same.

The third ground relates to the question whether Mr. Rainbow has qualified. The return sets up that Mr. Morrell has never had served upon him the certificate of the clerk of the county required by sections 597–599, How. Stat. These are as follows:

"SEC. 597. Whenever any new sheriff shall be elected in the place of any other, or upon the expiration of any sheriff's office, and shall have qualified and given the security required by law, the clerk of the county shall grant a certificate under the seal of the circuit court for the county that the person so elected has qualified and given such security.

"SEC. 598. Upon the service of such certificate on the former sheriff, his powers as such sheriff, except in the cases otherwise expressly provided by law, shall cease.

"SEC. 599. Within ten days after the service of such certificate upon such former sheriff, he shall deliver to his successor," etc.

It has been held, under a similar statute in the state of New York, that the former sheriff had authority to execute process until the certificate of the clerk is served

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upon him. This has relation, however, only to such process as he has in his hands, and which he is required by section 599 to deliver to his successor upon the service of such certificate upon him.

It follows that the writ of *mandamus* must issue as prayed for.

The other Justices concurred.

WALTER A. DORLAND v. EDWIN A. BURLINGAME, JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS.

Streets—Condemnation proceedings—Witness' and attorney's fees—Taxation of costs.

1. Section 17 of Act No. 124, Laws of 1883, which provides that witnesses in a street-opening case shall be entitled to receive from the city the same fees as are provided by law for similar services in an ordinary action at law in the circuit courts of the State, applies to witnesses produced and sworn upon *both* sides of the issues pending, which are the public necessity, and the just compensation to be made to the owner for taking his property.

2. In such a case the court has the power to limit the number of witnesses which may be produced to prove a single point, and thus prevent abuse; and the fees of *all* witnesses whose attendance is procured in good faith should, on filing the affidavit required to tax witness' fees in circuit courts, be taxed in favor of the party producing them.

3. Section 19 of Act No. 236, Laws of 1889, making it lawful for the judge in a street-opening case to order the payment by the city to any respondent of such a reasonable attorney fee as he may deem just, not exceeding $25, is not mandatory, but the matter of attorney fees is left discretionary with the judge.

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Mandamus. Submitted November 5, 1889. Granted in part and denied in part November 15, 1889.

Relator applies for *mandamus* directing that his witness' and attorney's fees in a street-opening case be taxed and paid by the city. Granted as to witness' fees. The facts are stated in the opinion.

Smith & Stevens, for relator.

CHAMPLIN, J. Certain land of the relator was condemned for street purposes in the city of Grand Rapids, for which he was awarded damages and compensation by a jury. He asks now that fees for his witnesses and an attorney's fee may be taxed and paid by the city.

The condemnation was had under Act No. 124, Laws of 1883, as amended by Act No. 236, Laws of 1889. Under this act the jury are to hear the proofs and allegations of the parties. The seventeenth section provides that—

"Officers, jurors, and witnesses, in any proceedings under this act, shall be entitled to receive from the city * * * instituting the proceedings the same fees and compensation as are provided by law for similar services in an ordinary action at law in the circuit courts of this State."

This section applies to witnesses produced and sworn upon both sides of the issues pending, which are the public necessity, and the just compensation to be made for taking the property of the owner. The court has the power to limit the number of witnesses which may be produced to prove a single point, and thus prevent abuse. The fees of all witnesses whose attendance is procured in good faith should, on filing the affidavit required to tax the fees of witnesses in circuit courts, be taxed in favor of the party producing.

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Section 19 of the act provides that—

"It shall be lawful for the judge in any case to order the payment by the city * * to any respondent of such a reasonable attorney fee as he may deem just, not exceeding twenty-five dollars, which may be taxed with the costs."

This section is not mandatory, but the matter of attorney fees is left discretionary with the judge. He may order the payment of an attorney fee or not, as he may deem just. He returns that he did not deem it just to allow attorney fees to relator in this case, and that disposes of this part of relator's claim.

A *mandamus* must issue, directing the allowance and taxation of fees for relator's witnesses, upon his filing the required affidavit, and pursuing the practice upon taxation of costs in the circuit court as to notice, etc., upon the city attorney.

The other Justices concurred.

JASON C. GILLETT v. LOUISA H. GILLETT.

Divorce—Fraudulent marriage—Ratification.

In this case the decree below annulling the marriage between the parties is affirmed, the fraudulent character of the transaction being clearly made out.

Appeal from Shiawassee. (Newton, J.) Argued November 14, 1889. Decided November 15, 1889.

Bill to annul a marriage claimed to be voidable for fraud. Defendant appeals from decree granting relief prayed. Affirmed. The facts are stated in the opinion.

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R. E. Kelsey and *James H. Goodell,* for complainant.

Cyrus E. Perkins and *Taggart & Denison,* for defendant.

CAMPBELL, J. The bill in this case was filed to set aside a marriage claimed to be voidable for fraud. It appears to our satisfaction, as it did to the court below, that complainant, who was a man of about 75, and who had lost his eye-sight, and was more or less deaf, and otherwise broken, was induced suddenly, and by putting him under the influence of liquors, and probably of drugs, to marry defendant, who was less than half his age, and had a young child, and for whom he had never entertained any attachment, and with whom he was very slightly acquainted. He had just become assured that he would receive a liberal pension, and $10,000 and upwards of arrears, and the motive for the conspiracy is manifest. He was not at the time in a condition to act with any appreciation of his surroundings, and the fraudulent character of the transaction is clearly made out. While there has been some delay, we do not think there has been any intelligent ratification of the marriage, and no equities that we can perceive render it inequitable to declare the marriage null. We shall not dwell upon details, which are not valuable for record, or edifying for any purpose, and the reasons given by the court below seem to cover the ground.

It is enough to say that we think the decree was properly granted. It will be affirmed, each party paying his or her own costs.

The other Justices concurred.

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SIMEON HEWITT v. SAMUEL DURANT.

Estates of deceased persons—Legacies charged upon land—Life-lease—Residuary devise—Levy—Execution sale of distinct interests in one parcel—Executors' sale—Jurisdiction of probate courts.

1. The statutory authority to sell lands under license of courts of probate is a special power, and confined to the case where the sale covers, so far as the land sold is concerned, the interest of which the decedent died seized. *Eberstein v. Oswalt*, 47 Mich. 256.

   So *held*, where executors were licensed to sell, and sold, 160 acres of land subject to a life-estate devised to the widow, and $3,500 in lagacies charged against the land, which sale is held void.

2. Whether, under a will devising to the testator's widow a life-estate in 160 acres of land, and bequeathing to each of two sons and three daughters a specified legacy to be paid out of the proceeds of the land after the mother's death, and all the rest and residue of the land to two other sons, in equal shares, to be given them after the mother's death, said legatees have any estate to levy upon prior to the mother's death, query?

Appeal from Oakland. (Moore, J.) Argued April 17, 1889. Decided December 28, 1889.

Bill to set aside a sale and conveyance of real estate by executors. Complainant appeals. Decree dismissing bill reversed, and one entered as prayed. The facts are stated in the opinion.

Auten & Moss (*O. L. Spaulding*, of counsel), for complainant, contended for the doctrine stated in the opinion.

Theo. Hollister and *Cass E. Herrington* (*John Fitz-Patrick*, of counsel), for defendant, contended:

1. Judicial sales should not be disturbed for technicalities; citing *Norman v. Olney*, 64 Mich. 553.

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2. Under How. Stat. § 6076, all the proceedings leading to the issuance of a license to sell real estate are conclusively presumed to be valid; citing *Schaale v. Wasey*, 70 Mich. 414.

3. Defendant was bound to look no further than to see—

a—That the executors were licensed to make the sale by the probate court having jurisdistion.

b—That they gave a bond which was approved by the judge of probate.

c—That they took the oath prescribed by law.

d—That they gave the required notice.

e—That the premises were sold accordingly, and the sale confirmed by the court; citing How. Stat. § 6076; *Blanchard v. DeGraff*, 60 Mich. 107.

4. The sale having been made by the probate court having jurisdiction, and the sale having been confirmed, the objections pointed out by complainant are at most irregularities, which, if not cured by the order of confirmation, will be shielded by it from collateral attack; citing *Osman v. Traphagen*, 23 Mich. 80; *Goudy v. Hall*, 36 Ill. 313; *McPherson v. Cunliff*, 14 Am. Dec. 642.

5. Complainant claims that the proceedings in the probate court are absolutely void because the land was sold subject to the life-estate of the widow, and legacies. If so, he has no standing in court, for his deed has priority of record, and his title cannot be injured by a later record based on a nullity; citing *Lumbering Co. v. Lovejoy*, 55 Mich. 192.

6. Complainant is bound to establish a clear legal or equitable title in himself, and cannot rely upon the weakness of his adversary's; citing *Stockton v. Williams*, 1 Doug. 546; *Griswold v. Fuller*, 33 Mich. 268; *Haddon v. Hemmingway*, 39 Id. 615; *Hardy v. Powell*, 40 Id. 413.

7. The levy was not properly made, purporting to be upon the "interests" of Edwin R. and Hiram E. Terry, instead of upon the land itself; citing *Arms v. Burt*, 18 Am. Dec. 680; *Paine v. Webster*, 1 Vt. 101; and a deed of land not lawfully levied upon conveys no title; citing *Campau v. Barnard*, 25 Mich. 384; and the owners of said interests cannot be deprived of their several rights to redeem by a blanket sale; citing *Lee v. Mason*, 10 Mich 403; *Udell v. Kahn*, 31 Id. 195; *McKay v. Kilburn*, 42 Id. 614.

SHERWOOD, C. J. The bill of complaint in this case is filed to set aside a conveyance of real estate given by the

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executors of the last will of Albert Terry, late of the township of Avon, in the county of Oakland.

Albert Terry died in 1880, leaving a widow, four sons, and three daughters. He also left personal property appraised at $2,051.64, and two farms, both situate in said town,—one containing 120 acres, appraised at $7,860, and the other consisting of 160 acres, appraised at $8,540. He left his entire estate without incumbrance, and made his will, whereby he gave the use of the large farm to his wife during her life. To his three daughters, he gave each, from the proceeds of the large farm, $500, and to his two sons, Lewis W. and Edwin R. Terry, $1,000 each, and the balance of said large farm, at the death of the widow, was given to his remaining two sons, Gilbert A. Terry and Hiram E. Terry, share and share alike.

The will was duly probated, commissioners were appointed to hear and allow claims against the estate, and by their report of August 11, 1884, it appears they allowed claims against the estate to the amount of $1,461.04, about half of which was for tombstones authorized by the will of testator. Hiram E. Terry and the widow, Lucinda C. Terry, were named in and duly appointed executors of the will.

In 1881 and 1882 Hiram E. Terry and Edwin R. Terry became indebted to the complainant for furniture and fixtures purchased to be used in a hotel, to the amount of twelve or thirteen hundred dollars. On July 3, 1884, complainant brought suit against E. R. and Hiram E. Terry by attachment, and levied it on certain real estate and personal property in Clinton county, and on the same day levied it upon the interest of defendants in the large farm in Avon, and served the writ personally upon both of said defendants, who appeared in the case and

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defended. Judgment was rendered against them in the Clinton circuit court for the sum of $1,456.74 damages, and $81.57 costs; and, the sheriff not being able to collect the judgment from the Clinton county property, sale was made of defendants' interest in the large farm in Avon for the sum of $1,000, under the execution, to complainant, and upon the expiration of the time to redeem he received the sheriff's deed therefor. Complainant caused to be filed the proper notice of the levy, and the recording of his conveyance in the office of register of deeds of Oakland county. There seems to be no question but that at the time the complainant received his deed there were no incumbrances upon the large farm, except those created under the will, and that his deed is prior in date of registry to that of defendant.

After the death of Albert Terry, Gilbert A. Terry mortgaged the small farm, on August 31, 1883, to Hiram E. Terry, for $1,400. He also gave a mortgage bearing the same date to John M. Norton for $5,000, and on May 17, 1884, he gave a mortgage to the defendant for $1,326.40; and Hiram E. Terry and the widow, on September 11, 1884, as executors, petitioned the judge of probate for leave to sell the two farms, they being all the real estate belonging to the estate of Albert Terry, to pay his debts. The petition asks for permission to sell the small farm subject to the $5,000 mortgage and the dower and homestead rights of the widow, and to sell the large farm subject to the widow's life-interest created by the will. The indebtedness is stated in the petition at the sum of $1,372.14. The day set for hearing on the petition was October 4, at which time the prayer of the petitioners was granted. February 21, 1885, the sale of the small farm was made subject to the Norton and H. E. Terry mortgages, and a certain lien and reservation of the wheat on the ground; and on July 18 following they sold the large farm to the

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defendant for $1,450, subject to the widow's life-interest, and $3,500 in legacies. Deeds were executed to the purchasers at both of these sales.

It will be noticed that the only interest sold in this farm was that of the two residuary legatees. The complainant resides at Maple Rapids, in Clinton county, and appears to have known nothing of the proceedings to sell by the executors for more than a year after the sale and confirmation thereof of the large farm, which is on section 33. The small one is on section 27.

The complainant claims the executors' sale is void, and asks that the deed of defendant given thereunder be set aside for the following reasons:

"1. The probate court never had any jurisdiction to grant a license to sell the real estate, as the order of hearing, giving the requisite time as required by statute, was not made; hence the court acquired no jurisdiction to proceed further.

"2. The probate court had no jurisdiction or authority to license the sale of the land on section 27 subject to the John M. Norton mortgage of $5,000; neither had it authority to confirm the sale of the same subject to the two mortgages, amounting to over $7,000, both of which were given by Gilbert A. Terry after the death of Albert Terry, deceased.

"3. As the license required the land on section 27 to be sold first, the sale of the land on section 33 is void, for the reason that the entire interest which the estate had on section 27 was not sold, but only about a twentieth part of it.

"4. The sale of the land on section 33 is void, because the probate court had no authority to license or confirm the sale of the same subject to the life-estate of the widow and $3,500 in legacies.

"5. The sale is also void because not made in accordance with the license therefor.

"6. The sale of all the real estate is void, because fraudulent."

The circuit judge held otherwise, and dismissed complainant's bill.

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While the probate court has general jurisdiction for certain purposes, yet its authority to act is created and limited by statute, and all proceedings taken in said court must conform to the statute to be of validity. Wells, Jur. § 271; *Bloom v. Burdick*, 1 Hill, 130; *Palmer v. Oakley*, 2 Doug. 476. The power to authorize the sale of lands by executors and administrators is a special one, and cannot be changed or enlarged by the probate court. *Eberstein v. Oswalt*, 47 Mich. 254 (10 N. W. Rep. 360).

It is unnecessary to consider all the reasons given by complainant's counsel to show the executors' deed of the large farm is void. We think the second, third, and fourth, above stated, are quite sufficient for that purpose.

The $5,000 mortgage had been placed on the small farm after the testator died. The interest of the testator at the time of his death is what the probate judge had authority to authorize the sale of for the payment of the debts of the estate, if he could authorize the sale of any. This he did not do. Consequently the sale was illegal, as well as the confirmation thereof. The sale of the small farm under the license to sell was directed to be made first. No legal sale ever having been made of the small farm, the sale of the other was without authority, under the license; and, besides this, the same objection obtained to the sale of the large farm as did to the sale of the small one. The probate court could not authorize the sale of either, except it should be the testator's whole interest therein; but the large farm was sold subject to the life-estate of the widow and the $3,500 legacies mentioned in the will. *Eberstein v. Oswalt*, 47 Mich. 254; *Daly's Appeal*, Id. 443 (11 N. W. Rep. 262).

It is unnecessary to examine as to what became of the personal property, which should always be applied first to

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the payment of debts, unless otherwise directed by the will. The defendant, however, claims that even if the executors' sale shall be held void, still, that would not entitle complainant to the relief he asks, but that the complainant must further show that he had a subsisting, valid adverse title and interest in the land in question as against the defendant, and, as he claims only under an execution sale, he must show the same valid; and defendant further claims this the complainant did not do at the circuit for the following reasons:

1. The return of the sheriff to the writ of attachment does not show that any property of the defendants', personal or real estate, in the county of Clinton, was seized, and this should have been done before the sheriff could take property of the defendants upon the writ in Oakland county.
2. The record shows that the Terry interest in the real estate in Clinton county was of no value.
3. One of the appraisers who appraised the property in Oakland county was not a freeholder.
4. The interest of Edwin R. Terry, being merely a legacy of $1,000 to be paid out of the farm on section 33, was not liable to attachment.
5. Under the execution from Clinton county, the sheriff had no authority to levy upon the land in Oakland county.
6. That complainant's testimony shows that the notice of sale is less than that required by statute, and that the notice itself is defective.
7. The levy made upon the property was not upon defendants' land, but upon the interests of the defendants in the land.
8. The sale under the execution was of a residuary interest in real estate and a legacy, and both were sold together, and struck off together, for one sum. It was a sale of real estate and personalty, under proceedings for the sale of real estate.

There is no occasion to notice the first and second points, further than to say the return shows that a compliance with the statute was had in the service of the

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writ, and the record shows that the property was of value which was attached.

The return of the officer shows that the appraisal was made by two disinterested freeholders of Oakland county, and his return cannot be impeached in the collateral manner attempted by the defendant.

The legatee's interest (Edwin R. Terry's) was an equitable interest in the land, and, as such, was liable to be sold in the manner pursued in this case. But there can be no question as to Hiram's interest. His residuary half interest in the large farm was of the fee, and subject to levy. *Drew v. Dequindre*, 2 Doug. 93; *Dodge v. Walley*, 22 Cal. 224. It clearly appears that the sheriff levied his attachment, first, upon the land in Clinton county, and the property was deemed by him insufficient to satisfy the debt, and he then made the levy upon the large farm in Avon, in Oakland county. This is what he was directed to do by his execution, and his action was a sufficient compliance with the statute. This disposes of the defendant's third, fourth, and fifth points, and the eighth has been sufficiently noticed in what has already been said.

The sixth and seventh remain to be considered. In regard to the sixth, it appears the notice of sale was published a sufficient length of time, if the affidavit of the printer can be relied upon; but it is claimed that in the first publication of notice the sale was advertised to take place at one o'clock in the forenoon, instead of one o'clock in the afternoon; but this was a mistake which could mislead no one. The sale could only take place in the daytime, between nine o'clock in the forenoon and the setting of the sun on that day, and the hour was one o'clock. Even if the defect complained of could be shown in this case, we do not think it was one that could prejudice any party, and therefore it must be held sufficient.

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In regard to the seventh point, we see no reason why the levy was not correct. It was the interest of the two Terrys, who were defendants in the suit, which was liable to be levied upon, and it was of no consequence whether such interest was either joint or several; it was all liable for the plaintiff's debt, and his demand against defendants was both joint and several. This is a question, however, in which the defendant is not particularly interested, and need not be further noticed.

We think it sufficiently appears that the amount in controversy was large enough to give the court jurisdiction, and the complainant is entitled to the relief he asks.

The decree at the circuit must therefore be reversed, and a decree entered here in accordance with the prayer of the bill, with costs of both courts.

MORSE, J., concurred with SHERWOOD, C. J.

CAMPBELL, J. Without holding absolutely that there was no estate to levy on, but not seeing that there was any such interest, I concur in holding that, if there was any, my Brother SHERWOOD is right.

CHAMPLIN and LONG, JJ., concurred with CAMPBELL, J.

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THE STROBRIDGE LITHOGRAPHING COMPANY v. JAMES A. RANDALL, IMPLEADED WITH JOSEPH BROOKS AND JAMES DICKSON.

Partnership—Liability of new partner on renewal notes—Retiring partner—Release—Charge to jury—Verdict.

1. In this case it is held that the agreement made by the telegrams to accept notes held by defendant Randall, and discontinue the suit, has all the essential elements of a valid contract, upon which an action might have been maintained by the plaintiff upon a refusal by Randall to deliver the notes; that such new contract was not collateral to the original contract of indebtedness sued upon, giving to Randall merely a claim for damages in case of its breach, but that it operated directly upon such original contract, and could be pleaded in bar of the same. *Robinson v. Godfrey*, 2 Mich. 408; *Morgan v. Butterfield*, 3 Id. 615; *Kent v. May*, 13 Id. 88; *Seligman v. Pinet*, 78 Id. 50.

2. Where the foreman of a jury announced that they found for the plaintiff in a given sum, and, at the request of plaintiff's counsel, the court inquired if it included interest, and one of the jurors replied that it did and stated the amount of the principal, it is not error for the court, if satisfied that interest was not included, to send the jury out again, to ascertain such interest.

Error to Wayne. (Reilly, J.) Argued November 6, 1889. Decided December 28, 1889.

Assumpsit. Plaintiff and defendant Randall bring error. Reversed. The facts are stated in the opinion.

Charles M. Swift, for plaintiff, contended:

1. The most that can be claimed for the testimony is that it shows an executory agreement for accord, and a subsequent tender of performance, which was not accepted. Such an agreement and tender is no bar; citing *Rising v. Cummings*, 47 Vt. 345; *Simmons v. Hamilton*, 56 Cal. 493; *Cary v. Bancroft*, 14 Pick.

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315; *Clifton v. Litchfield*, 106 Mass. 34; *Hearn v. Kiehl*, 38 Penn. St. 147; *Kromer v. Heim*, 75 N. Y. 574; *Cushing v. Wyman*, 44 Me. 121; *Young v. Jones*, 64 Id. 563; *Pettis v. Ray*, 12 R. I. 344.

Orla B. Taylor and *Edwin F. Conely*, for defendant Randall, contended:

1. Whenever a new consideration is introduced, an agreement to vary the terms of a contract, or change the method of payment of a debt, when carried out, will be binding, and will prevent a recovery on the original obligation. The acceptance by a creditor of a note made by a third person, though for a less sum, will form such a new consideration; citing *Webb v. Goldsmith*, 2 Duer (N. Y.), 413; *Pulliam v. Taylor*, 50 Miss. 251; *Boyd v. Hitchcock*, 20 Johns. 76; *LePage v. McCrea*, 1 Wend. 164; *Booth v. Smith*, 3 Id. 66; *Kellogg v. Richards*, 14 Id. 116; *Frisbie v. Larned*, 21 Id. 451; *Brooks v. White*, 2 Metc. 283; *Goodnow v. Smith*, 18 Pick. 414; *Varney v. Conery*, 77 Me. 527; *Brassell v. Williams*, 51 Ala. 349; *Dryden v. Stephens*, 19 W Va. 1.

2. Where such a new contract has been substituted for the original one, with mutual promises upon which each party has a remedy against the other, the new contract will take the place of the old, and each party must seek his remedy thereon; citing 1 Com. Dig. "Accord" (B. 4), § 6; *Case v. Barber*, T. Raym, 450; *Bradley v. Gregory*, 2 Camb. 383; *Cartwright v. Cooke*, 3 B. & Ad. 701; *Coit v. Houston*, 3 Johns. Cas. 243; *Whitsett v. Clayton*, 5 Col. 476; *Babcock v. Hawkins*, 23 Vt. 561; *Merry v. Allen*, 39 Iowa, 235; *Hall v. Smith*, 15 Id. 584; *Christie v. Craige*, 20 Penn. St. 430; *Bradshaw v. Davis*, 12 Tex. 336; *Jones v. Perkins*, 29 Miss. 142; *Schweider v. Lang*, 29 Minn. 254; *Goodrich v. Stanley*, 24 Conn. 613; *Brown v. Spofford*, 95 U. S. 474; and this defense is good as a plea *puis darrein continuance;* citing *Hearn v. Curran*, 12 S. & M. 361.

3. By his retirement Randall became a surety, both as between himself and Brooks & Dickson, and as to creditors having knowledge thereof; citing *Smith v. Shelden*, 35 Mich. 42; *Bell v. Hall*, 5 N. J. Eq. 477; *Stone v. Chamberlin*, 20 Ga. 259; *Barber v. Gillson*, 18 Nev. 89; *Wilde v. Jenkins*, 4 Paige, 481; *Thurber v. Corbin*, 51 Barb. 215; *Savage v. Putnam*, 32 N. Y. 501; *Colgrove v. Tallman*, 67 Id. 95; *Palmer v. Purdy*, 83 Id. 144; *Conwell v. McCowan*, 81 Ill. 285; *Gates v. Hughes*, 44 Wis. 332.

4. After a creditor has knowledge of the dissolution of the partnership and the assumption of the debts by one partner, any act

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between that partner and the creditor changing the contract, extending the time, or any dealing by the creditor with the principal which amounts to a departure from the contract, without the consent of the retiring partner, releases him; citing *Smith v. Shelden*, 35 Mich. 42; *Miller v. McCan*, 7 Paige, 452; *Fellows v. Prentiss*, 3 Denio, 512; and the same principles which are held to discharge a surety in equity also operate to discharge him at law; citing *Baker v. Briggs*, 8 Pick. 129; *King v. Baldwin*, 17 Johns. 384; *Bank of Ireland v. Beresford*, 6 Dow, 233.

MORSE, J. In this case both the plaintiff and the defendant James A. Randall come into this Court on writ of error. Neither is satisfied with the judgment in the court below, and both are anxious for a new trial

The plaintiff sued the defendants, who composed at one time the firm of Brooks & Dickson, in *assumpsit*, upon notes made by Brooks and Dickson, before Randall became a member of the firm. Some of these notes were renewed, and some extended, while Randall belonged to the copartnership. A statement of the plaintiff, introduced during the trial, showed $4,140.85 principal and interest due on the renewal notes, $3,531.83 on the extended notes, and $6,497.92 on the other notes. Plaintiff also sued for $5,589, value of printing done and furnished to the new firm. Before the case went to the jury the plaintiff withdrew all of its demands, except the renewal notes and the printing furnished for the new firm. The plaintiff had verdict and judgment for $1,696.74, of which the jury found $1,562.30 as principal and $134.44 as interest.

It appears from the evidence in the case that in April, 1884, the firm of Brooks & Dickson, then composed solely of those two gentlemen, was owing the plaintiff for work done and printing furnished, some $13,000, and in that month and year gave 20 promissory notes of the firm to said plaintiff in payment of said debt. July 1,

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1884, the defendant Randall became a member of the firm, the name of such firm continuing as Brooks & Dickson. The articles of agreement of copartnership expressly provided that neither the new firm nor James A. Randall assumed, or in any wise became responsible for, any debts or obligations of "the late firm of Brooks & Dickson," except such obligations, by way of contracts made for the business season of 1884 and 1885, which had in no wise, at that time, been performed. When the evidence was all in, the plaintiff claimed that there was due it, upon the work done and furnished for the new firm, the sum of $3,326.17.

The defendant Randall admitted that the account for such work had not been fully paid at the time suit was brought, but he claimed that certain deductions should be made from plaintiff's claim. Starting with plaintiff's claim at $3,326.17, Randall claimed that the deductions should cut the amount down to $1,753.87, without interest; but he further claimed that the amount from which the deductions should be taken was but $2,758.33, which would leave due the plaintiff, without interest, $990.57. He also claimed a settlement and release of his liability since the commencement of suit, which defense was not permitted by the court to go to the jury. It is evident that the jury did not allow the plaintiff anything for the renewal notes, but based their verdict upon what they found due for the work furnished by plaintiff to the new firm.

"After being absent for a time, the jury returned into court; and, being inquired of as to their verdict, the foreman replied that they found for the plaintiff, for the sum of $1,562.30.

"Counsel for the plaintiff requested the court to inquire of the jury whether such sum included interest. One of the jurors replied that it did; that the principal sum was $888, and, with interest, it amounted to $1,562.30. Coun-

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sel for defendant objected to the jury being interrogated on the subject of interest. The court thereupon told the jury that, in whatever amount the plaintiff was entitled to recover, he was also entitled to interest at 6 per cent.

"Thereupon the jury again retired, and, after being absent for a time, returned into court, and, being inquired of as to their verdict, said that they found for the plaintiff, in the sum of $1,696.74, of which $1,562.30 was principal and $134.44 interest."

Both plaintiff and defendant complain of this action of the court and jury, as shown in the above quotation from the record. The plaintiff immediately moved to set it aside, on the ground that it was manifest that the jury were giving plaintiff a verdict, not for any sum that it claimed, but for the amount defendant insisted constituted an offset to its claim. It claims that upon the work furnished the new firm there should at least have been found the sum of $1,753.87 due, with interest upon the same at 6 per cent.

The defendant made three statements or computations, based upon the evidence as to the balance due plaintiff upon this work,—No. 1 showing the balance to be $990.57; No. 2 $1,753.87; and No. 3 $1,465.35. The court only submitted the second statement to the jury; and therefore plaintiff's counsel claims that the verdict, at all events, should have been for the sum mentioned in said statement, with interest, but that in reality the jury took the sum $1,562.30 (which Randall claimed, in this statement, No. 2, should be deducted from $3,326.17, the amount claimed by plaintiff), and gave their verdict for that sum as principal, when, under the instruction of the court, it should have been for $1,753.87.

We do not so understand the matter. Mr. Randall made his three statements, as he had a right to do, under the evidence, to meet different phases of it, or the facts as they might be found by the jury. The court said, in his charge:

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"I will submit to you, for the purpose of aiding you, a statement prepared by the plaintiff's counsel, and also a statement (No. 2) prepared by the defendant's counsel."

But he did not confine them, in their findings, to these statements, or either of them, but said to them that, from the evidence in the case, they must determine what amount, if anything, was due from the defendants for the goods furnished.

We do not propose to go into the evidence; but we find nothing in the testimony, or in the charge of the court, showing that the jury found a sum not warranted by the evidence or the law of the case as regards the amount due for this work. And we think it was proper for the court, under the circumstances, to inquire if the verdict included interest, and that, if he was satisfied it did not, he had the right to send them out again, to ascertain the interest. It does not appear, however, from the record, but that they retired again for that purpose upon their own motion. The fact that one juror got mixed in his figures in his response to the inquiry will not vitiate the verdict finally rendered.

The plaintiff's counsel also claims that the new firm was liable upon the renewal notes, as a matter of law, and that the question of such liability should not have been submitted to the jury. The question, we think, was one entirely of fact, to be deduced from the testimony, and that the court charged the jury, in this respect, too favorably for plaintiff. The circuit judge instructed them that if they believed from the testimony that "it was understood" by the plaintiff that the new firm was to be liable for the extension of the old notes by these renewals, then the defendant was liable.

"If you believe from the testimony that it was distinctly understood by the plaintiff in the case that, although Mr. Randall was in the firm of Brooks & Dick-

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son, he was not liable on the renewals that were made by the firm, then I do not think he can be held. In this connection, I will say to you that if nothing was said to the plaintiff by the defendants Brooks & Dickson, and Randall, and, when these notes fell due, they were renewed by Brooks & Dickson, and Randall being then a partner in the concern, and the time for payment being extended, Mr. Randall would be liable on the notes. That is, an extension of time for the payment to the firm of Brooks & Dickson would be sufficient to hold Mr. Randall."

This instruction left out the fact that it "takes two to make a bargain," and rested the liability of Mr. Randall entirely upon the understanding of the plaintiff. The jury evidently found that plaintiff, when the notes were renewed, did not "understand" that Randall was making himself liable for them by such renewals, and we think there was testimony which would, if believed, warrant such a finding.

Defendant Randall claims that by the action of plaintiff since the suit was commenced he has been released from all liability on account of said firm of Brooks & Dickson; and he filed a proper plea, setting up such claim. It appears from the testimony that, when the firm of Brooks & Dickson dissolved, Brooks and Dickson paid Randall some money, and gave him their promissory notes, four in number, for $1,000 each. July 31, 1885, seven months after this suit was begun, Randall received the following telegram from the president of plaintiff company:

"NEW YORK, July 31, 1885.

"JAMES A. RANDALL,

"Attorney at Law:

"Will you turn over to us the notes, amounting to $4,000, you hold of Brooks & Dickson? If so, will release all parties from suit against Brooks & Dickson, and they will get you released from all other indebtedness of the firm. Answer here, quick.

"HINES STROBRIDGE."

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To this Randall replied as follows:

"DETROIT, July 31, 1885.

"To HINES STROBRIDGE, STROBRIDGE LITHOGRAPHING Co.,

"44 West 23d St., N. Y. City:

"Certainly. Notes have been assigned to Atkinson, but will get them, and turn them over to you, on conditions your telegram. JAMES A. RANDALL."

Randall testified that he immediately procured the notes from Atkinson, who held them as security for a debt Randall owed him, and has ever since been ready to carry out the agreement. He brought the notes into court, with his plea, ready to be delivered. He testified that he notified Mr. Hines Strobridge, the following day, that he had obtained the notes, and had them for him; that from this until some six months thereafter he did not hear anything from Strobridge, and was under the impression that the matter was settled.

February 2, 1886, Strobridge wrote Randall as follows:

"*Dear Sir:* Your favor of the thirtieth ult. is at hand, and noted. We have been expecting to hear that Brooks & Dickson have carried out, in good faith, their proposition to settle the claim against that company, and which would release you from all liability. I think our attorneys, H. & H., in New York, have not exerted themselves to bring it about. We have written to them to-day, requesting them to bring it to a close, if they can, and, if not done at once, they should prevent the discharge of Nunnemacher as assignee of said estate. Howe & Hummell, or Samuel Colville, told me that Nunnemacher had not kept within the line of duty in disposing of the assets, and they acknowledge that Nunnemacher could be made to pay back the estate moneys that had been misappropriated, and we believe substantially what you have told us in regard to his actions. We hoped to be able to settle the matter, and that the suit we felt called upon to bring against you could be withdrawn."

Randall further testifies that he did not know, and was

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not informed, as to what arrangement Strobridge had with Brooks & Dickson, upon which he acted when he sent the telegram to Randall offering to settle. Mr. Strobridge testified, in reference to this matter, that he sent the telegram. The sending of it was the result of a conference held in New York with Brooks. Brooks promised that, if Strobridge would get the notes, Brooks & Dickson would furnish him the money for them, $4,000. Two weeks afterwards he learned from Brooks that he could not get the money, and the matter was dropped. The notes were to be sent by Randall to New York. They never came, and he never asked Randall to send them. Did not notify him when or where to send them. Never said anything to him about getting them, after the exchange of telegrams. The agreement with Brooks was for the release of all the partners. Brooks did not fulfill his agreement with witness, so Strobridge did not carry out the agreement with Randall. Nothing was done, however, to declare the agreement off for six months. Does not think that he ever said anything to Randall about the notes, or notified him that he would not take the notes, before the plea of settlement was put into the case.

Defendant Randall submits that he was released, in law, under the testimony of himself and Strowbridge, but that, at any rate, the matter of such release should have been submitted to the jury. The counsel for plaintiff contends that, under the testimony of Mr. Randall, this was an agreement to settle, in the nature of an accord and satisfaction, which is not good until performed; that no tender of performance can take the place of satisfaction, unless accepted; that, as the case stands, there was an accord, but no satisfaction, and therefore there is no bar to the action, under all the authorities; that, in an agreement of this kind, if anything remains to be done by either party, the new agreement will not be binding.

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There was a good consideration for this agreement between the parties. A suit was pending, and a dispute between them. Strobridge writes that, if Randall will turn over these notes to him, he will release all the parties from the suit; in other words, discontinue it. Randall replies that he will accept the proposition and get the notes, and turn them over. Randall obtains them next day, and writes soon thereafter to plaintiff that he has them ready to turn over; and, according to Strobridge's testimony, he never informs Mr. Randall that he will not take the notes, and in his letter of February, 1886, he gives Randall to understand that the matter would probably be closed, and he released. There is no controversy as to the authority of Hines Strobridge to make this settlement.

It seems to me that a new and valid agreement was made to take these notes of Randall in payment of all claims against him growing out of this suit, or involved in it, and that, under the facts, there really being no conflict as to the material facts as to this settlement, or agreement to settle, between Strobridge and Randall, a verdict should have been directed, upon the whole case, in Randall's favor. Strobridge agreed to take the notes and release Randall. Randall accepted the proposition, and notified Strobridge that he had the notes for him. Strobridge did not notify Randall that he would not take them, but led him, for several months, to believe the matter was settled. When it was ascertained that the plaintiff intended to go on with its suit, Randall pleaded this settlement, and tendered the notes to plaintiff, by bringing them into court. This seems to me a sufficient bar to the suit as against Randall; and the plaintiff must be held to its bargain to take the notes.

I do not think that this case calls for the consideration of the abstract question whether accord without sat-

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isfaction would be a good plea. The agreement made here by the telegrams has all the essential elements of a valid contract, and upon which an action might have been maintained by plaintiff upon a refusal by Randall to deliver the notes. See *Coit v. Houston,* 3 Johns. Cas. 243; *Whitsett v. Clayton,* 5 Colo. 486.

And this new contract was not an agreement collateral to the original contract of indebtedness upon which plaintiff was suing, giving to Randall merely a claim of damages in case of a breach of it, but it operated directly upon the original contract, and could be pleaded in bar of the same. *Robinson v. Godfrey,* 2 Mich. 408; *Morgan v. Butterfield,* 3 Id. 615; *Kent v. May,* 13 Id. 38; *Seligman v. Pinet,* 78 Id. 50 (43 N. W. Rep. 1091).

The judgment is reversed, and a new trial granted, with costs to the defendant Randall.

The other Justices concurred.

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WILLIAM LITTLE v. THE STREET RAILWAY COMPANY OF GRAND RAPIDS.

Contributory negligence—Directing verdict—Province of trial court.

It is error to direct a verdict for the defendant in a negligence case on the ground of plaintiff's contributory negligence, when, in order to convict plaintiff of such negligence, it is necessary to *assume* that he must have heard what other unimpeached witnesses did not hear, or seen what they did not see.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued October 9, 1889. Decided December 28, 1889.

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Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Crozier & Cutler (Blair, Kingsley & Kleinhans, of counsel), for appellant.

Montgomery & Bundy, for defendant.

CAMPBELL, J. Plaintiff, while digging in a sewer-connecting ditch in a street in Grand Rapids, was struck in the back by the projecting foot-board of an open passenger street-car, and badly injured. He sued defendant for damages, but the court below took the case from the jury on the ground of contributory negligence.

The testimony showed that a public sewer runs down the middle of South Division street, between two parallel tracks of defendant's railway. Plaintiff, with another person, was employed to dig a ditch from a lot owned by Mr. Barnes on the east side of the street to this sewer, for the purpose of making a drainage connection with it. This work was authorized by the proper city authority. The space between the curb and the sewer was 17 or 18 feet, and from the curb to the railway track less by the width of the track or thereabouts. They had dug down about three feet from the surface, and in digging threw out earth on the north side, and gravel a few inches on the south side, bringing the depth to the height of a man's waist. Plaintiff was digging at the time of the injury with his face towards the sidewalk, and throwing dirt on the north side of the trench, which was nearly four feet wide on top. This turned his face a little northward, making it necessary to turn his head to look southward. He was standing, when upright, not very far inward from the rail. The car moving rapidly northward, he was first struck, according to some of the witnesses, by the end of the whiffletree of the off-horse,

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and thrown back or moved back so as to come in reach of the edge of the foot-board. The blow does not seem to have been a square blow with the end of the board, as it broke no bones, but injured him internally.

The tracks in question extend southward from the place of the accident about 700 feet to Hall street, and then turned at a right angle eastward along Hall street a short distance. Cars going south took the west track, and returned on the east track. The car in question had a few minutes before gone down the west track, and, being behind time, or for some other reason, passed at a much faster rate than usual, which, according to several of the witnesses, was from one and a half to one and two-thirds the ordinary and legal rate of six miles an hour, which would make the running time from Hall street considerably less than a minute; and if the speed southward was also accelerated, as seems to be indicated by some testimony, would bring the return still further within the usual interval.

That the driver was negligent is hardly questioned, and negligent to a gross degree, not only in driving very fast, but in doing so without keeping any lookout ahead whatever. The only question is whether plaintiff was so unequivocally negligent that there were no facts for the jury.

It is not disputed that he was engaged in lawful work, and he was doing it in a lawful way. It was, like all other manual labor, such as required his attention to do it properly. He had also a right to expect that the cars would not be run in any unusual way, or carelessly. It was also his own duty to keep a reasonable degree of care on such perils as were incident to the work, as it was that of the defendant to avoid any careless interference with the rights of those lawfully working near the track, and to avoid doing mischief.

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Plaintiff swore positively that he did not hear the car coming. Although there was some conflict, there was evidence which indicated that there were street noises which deadened the sound of the car, such as it was. Several witnesses who had the same opportunity as plaintiff, if not better, swore they did not hear the bells or any other noise that drew their attention. Plaintiff swore, and is corroborated in the statement, that he looked towards Hall street at short intervals, and did not see the cars, when, if they had been going at the usual rate, they would have been some distance nearer than the corner. Defendant introduced no testimony at all, and, in order to convict plaintiff of negligence, it was necessary to assume that he must have heard what other unimpeached witnesses did not hear, or seen what they did not see. To assume, in the face of testimony to the contrary, that there were bells that made such a noise as should have given warning of their coming to all persons, or that the noises of the street must have had no effect in deadening the noise of the car in its approach, is to go beyond the province of the court, and prevent the jury from passing on pertinent facts. That plaintiff took some precautions is shown affirmatively. It was for the jury to say whether, under all the circumstances, he was so remiss that failure to actually hear or see the car in its approach, so as to avoid it, is his own fault, so as to make him responsible for his own hurt. The case should not have been taken from the jury.

Judgment is reversed, with costs, and a new trial ordered.

The other Justices concurred.

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MAGGIE F. TICE v. BAY CITY.

Constitutional law—Municipal corporations—Defective sidewalks—Negligence—Declaration—Evidence.

1. Act No. 264, Laws of 1887, providing for the recovery of damages for injuries sustained by reason of defective highways, etc., is constitutional.
2. A declaration under said act avering that the accident occurred upon one of the principal streets of a city, by reason of a defective sidewalk, which defect was a dangerous one, and had existed for three months, and that the defendant then and there knew that the sidewalk was unsafe, and not fit for travel, sufficiently states knowledge or notice of the defect by the defendant.
3. In such a case it is error to permit the plaintiff to show the bad and defective condition of the walk at other places beyond the defect which caused the injury. *Dundas v. Lansing*, 75 Mich. 499.

Error to Bay. (Cobb, J.) Argued October 18, 1889. Decided December 28, 1889.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

John C. Weadock (*T. A. E. Weadock*, of counsel), for appellant.

Shepard & Lyon, for plaintiff.

SHERWOOD, C. J. This is an action on the case brought by the plaintiff against the defendant to recover for a personal injury received by reason of plaintiff's foot being caught in a hole in the sidewalk on the east side of Jefferson street, in Bay City.

There seems to be no question but that the walk was one it was the duty of the city to keep in repair, and

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that it was defective when the plaintiff received her injury is not denied; but it is claimed by the defendant that the walk was not in an unsafe condition, and, further, that the defect, such as it was, was never known to the defendant previous to the accident. Such was the contention of defendant's counsel before the jury. On the trial the plaintiff had a verdict for $2,300. The defendant brings error.

It is assigned as error and claimed by defendant's counsel that the law under which the action is brought is unconstitutional. We find nothing in the law unconstitutional, either in its title or mode of enactment, or in the body of the act itself.

It is also thought the declaration is insufficient, by defendant's counsel. He did not demur to it, and we think it is sufficient. It is claimed it does not sufficiently state knowledge or notice of the defect by the defendant. It avers that the accident occurred in Bay City, and upon one of its principal streets, through and by reason of a defective sidewalk; that the defect was a dangerous one, had existed there for three months, and that the defendant then and there knew it was unsafe, and not fit for travel. We see no reason for any further specification of facts to bring the case within the statutes. Certainly, the defendant had sufficient time after such knowledge to make any needed repairs, and upon this question the truth of the declaration must be assumed.

The plaintiff was allowed to show the bad and defective condition of the walk at other places beyond the defect which caused the injury. In *Dundas v. Lansing*, 75 Mich. 499 (42 N. W. Rep. 1011), this was held to be error, and it was unquestionably serious error in this case.

I think the judgment should be reversed, and a new trial granted.

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CAMPBELL, CHAMPLIN, and LONG, JJ., concurred with SHERWOOD, C. J.

MORSE, J., *(dissenting)*. I have been unable to find any error in this case.

JOHN ADAMS v. BAY CITY.

Municipal corporations—Construction of charter provision—Sewers—Special assessment on property benefited—Jurisdictional defect.

1. Section 17 of the charter of Bay City requires that the lots and premises specially benefited by the construction of a sewer or sidewalk shall be assessed according to the benefits derived from such improvement, while section 50 of the charter requires that the comptroller shall set down in the tax roll the description of all the lands and premises he deems to be specially benefited by the proposed work, the amount assessed against each description, which shall include the contract price of construction and the amount, as estimated by the board of public works, for surveying, superintending, construction, and advertising. And it is held that if the assessing officer should, under the two sections, assess the whole cost of the work as commanded by section 50, and yet show that such assessment did not exceed the whole amount of benefits derived by the property assessed from the improvement, there would be no conflict between the two sections.

2. Under a charter providing that the lots and premises specially benefited thereby shall be assessed according to the benefits derived from the construction of any sewer or sidewalk, the roll must show expressly that the assessment was made on the basis fixed by the charter, and it should also appear of record somewhere that the benefits to the whole property included in the taxing district will equal the whole cost of the proposed work. *Warren v. Grand Haven*, 80 Mich. 24-30; *White v. Saginaw*, 67 Id. 40, 41, 42.

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Error to Bay. (Cobb, J.) Argued October 18, 1889. Decided December 28, 1889

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

John C. Weadock, for appellant.

Shepard & Lyon, for plaintiff.

MORSE, J. The plaintiff brought this action to recover $215.46, paid by him under protest to the treasurer of Bay City. The money was demanded by said treasurer, and the property of plaintiff levied upon by virtue of a local tax roll and the warrant attached thereto, upon which tax roll an assessment was made against plaintiff and certain lots and premises owned by him, for the purpose of defraying a portion of the cost of a sewer. The case was tried before the court without a jury. Findings of fact and law were made and filed, and judgment entered for plaintiff for $230.

In support of the conclusions of law found by the circuit judge, that the assessment of the taxes demanded of plaintiff was illegal and void, and not a valid lien upon the plaintiff's land, or a personal liability against him, his counsel submit the following objections to the tax:

"That the provision of the charter of Bay City relative to assessments of taxes for local improvements is void, in that it directs that the tax shall be assessed upon the property especially benefited, according to the benefit derived; and also the charter directs the comptroller as to the amount that he must assess upon the property benefited, irrespective of whether it is benefited in that sum or not.

"That the necessity of a sewer from Sherman street to the Saginaw river, upon Twenty-first street, said city, was not determined by the common council of said city.

"That no tax to defray the expense of constructing

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said sewer was ever ordered by the common council of Bay City.

"That by no certificate, record, or other matter was it made to appear that the land assessed upon said roll was specially benefited by the construction of such sewer, and that it was assessed according to the benefit which it derived from such sewer.

"That several separate lots were assessed by the comptroller as one parcel.

"That the treasurer had no authority to enforce the collection of the tax by distress of the personal property of plaintiff."

Our attention upon the first point is called to the provisions of the charter of Bay City. Section 17, Act 346, Local Acts of 1881, provides and requires that the lots and premises specially benefited thereby shall be assessed according to the benefits derived from the construction of any sewer or sidewalk. Section 50 of the same act was amended by Act No. 287, Local Acts of 1883, directing what the assessment should contain, so that it now reads:

"The comptroller shall prepare a tax roll, in which roll he shall set down the description of all the lands and premises he deems to be specially benefited by the proposed work, the amount assessed against each description of property, which amount shall include the contract price of construction and the amount, as estimated by the board of public works, for surveying, superintending, construction, and advertising."

It is claimed that this amendment is inconsistent with the theory of assessing according to benefits, and requires that an assessment shall be extended against the property especially benefited, in an amount equal to the contract price of construction and the amount, as estimated by the board of public works, for surveying, superintending, construction, and advertising, without reference to the fact whether the whole amount of benefits equals the cost of the work or not, and that the record shows that this

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was actually done in this case. We do not find it necessary to hold that there is anything inconsistent between the two sections of the charter. If the assessing officer should, under the two sections, assess the whole cost of the work, as he is commanded to do under section 50, and yet show that such assessment did not exceed the whole amount of benefits derived by the property assessed from such improvement, there would be no conflict between the two sections.

In the record before us, however, we find nowhere any finding by anybody of the benefits arising from the making and maintenance of this sewer, nor any certificate that the assessment was made upon the lots taxed in proportion to the benefits they would respectively receive from the same. Section 50 of the charter provides that the comptroller shall assess the benefits, and we find no provision giving any other person or body the right to determine the benefits, except the board of public works, which receives the tax roll from the comptroller, and has authority to revise and correct it, supply any deficiencies, and make any changes it deems best (section 51); and they are also made a board of review. After the roll has been reviewed and corrected, the comptroller must indorse it, the form of which indorsement is prescribed by section 52 of the charter. And it is further provided in this same section that after such indorsement said roll—

"Shall be *prima facie* evidence, in all courts and tribunals, of the regularity of all proceedings preliminary to the making thereof, and of the validity of said tax and tax roll."

The tax roll, or what purports to be a portion of it, is given in the record, and the circuit judge finds that it was approved by the board of public works, and properly indorsed by the comptroller, as provided by section 52. He also finds that no certificate was attached to said roll

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other than this certificate of its approval by the board of public works, as required by and set forth in section 52, and that no record was made showing the manner in which the lands upon said roll were assessed. Nowhere, then, does it appear, unless taken for granted, that the benefits of this work equaled the tax laid by the comptroller, or that the lands were assessed in proportion to the benefits specially derived by them from such work.

We think that this cannot be taken as granted; that this roll should show expressly that the assessment was made on the basis which the charter lays down. And this is not an irregularity which is cured by the provision that the roll, after indorsement, shall be *prima facie* evidence of the validity of the tax. It is jurisdictional, and must appear upon the roll, and we think it should also appear of record somewhere that the benefits to the whole property included in the taxing district will equal the whole cost of the proposed work. *Warren v. Grand Haven*, 30 Mich. 24–30; *White v. Saginaw*, 67 Id. 40, 41, 42 (34 N. W. Rep. 255).

Since this suit was begun, the charter has been amended (Local Acts of 1889, pp. 704–714). Section 17, as amended, provides, in effect, that there shall be a finding of benefits, as it now provides that the expense of constructing a sewer shall be assessed upon the lots and premises specially benefited thereby, according to the benefits therefrom: Provided, that if such expense shall amount to a larger sum than the benefits, then the costs, exceeding the benefits, shall be chargeable to the wards in which the improvement is to be made; and such excess could not be ascertained without a finding of benefits. Local Acts of 1889, pp. 714, 715.

Under the section as it stood when this tax was laid, the whole cost was laid upon the property especially benefited. The plaintiff had a right to demand that there

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should be a finding of benefits, and also that it should appear upon the assessment roll, or somewhere of record, in what manner these benefits were apportioned, and under what rules. He had a right to know upon what standard or basis the comptroller acted, that he might ascertain whether or not it was a legal one. Otherwise the comptroller might act upon his own notions, and there would be no means by which to ascertain what those notions were, or to determine whether or not the statute had been complied with.

We do not consider it necessary to consider any of the other objections to this tax.

The judgment of the court below is therefore affirmed, with costs.

The other Justices concurred.

ALBERT E. FRENCH v. SETH E. ENGLE.

Costs—Judgment reduced by set-off below $100.

In this case it is held that the plaintiff established a claim exceeding $100, which was reduced by set-off, and that he is entitled to costs.

Error to Wayne. (Brevoort, J.) Argued October 30, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

S. E. Engle, in *pro. per.,* for appellant.

Edwin F. Conely, for plaintiff.

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CHAMPLIN, J. The question in this case is one of costs.

The action was *assumpsit*, and the plaintiff filed a bill of particulars amounting to over $300. The defendant pleaded the general issue, and gave notice of set-off, and filed a bill of particulars for $365, and notice of recoupment, under which he claimed $110. The jury returned a verdict in favor of plaintiff for $60, and the court rendered judgment for that amount, with costs.

The only question is whether it appears that the plaintiff's claim, as established at the trial, exceeded $100, and that the same was reduced by set-off.

We think it did, and that it was reduced by set-off; and the judgment is affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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ABRAM VAN VRANKEN ET AL. v. THE UNION NEWS COMPANY.

Contract—Agency—Ratification.

In this case it is held that the authority of defendant's local agent to make the contract sued upon is sufficiently shown by the evidence, which question should have been submitted to the jury, as also the question of defendant's ratification of said contract.

Error to Wayne. (Garther, J.) Argued October 11, 1889. Decided December 28, 1889.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

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Sands F. Moore, for appellants.

Moore & Canfield, for defendant.

SHERWOOD, C. J. The plaintiffs in this case reside in Detroit, and wished to start and distribute free, to passengers on incoming trains, an advertising newspaper to be called "The Hotel Register." The defendant is a New York corporation, and had the exclusive control of the facilities for the circulation of such paper, and was distributing such a paper at Detroit, called "The Visitor," at that time. Dembitz was the defendant's local manager at its office at the Michigan Central depot in Detroit, and Mr. Walsh was the general manager of the defendant's western division. Mr. Wildman saw Walsh and told him of plaintiffs' project, and was informed by Walsh that arrangements could be made for having the Hotel Register distributed on the trains, and about a week thereafter he called on Dembitz to make a contract for such distribution. Mr. Dembitz, after consulting Mr. Walsh in the matter, informed two of the plaintiffs that he was ready to make a contract with the plaintiffs, and plaintiffs claim they did make with said defendant a certain contract, partly oral and partly written, and that the written part was as as follows:

"For a valuable consideration to us in had paid, the receipt whereof is hereby acknowledged, we, the undersigned, the Union News Company of Detroit, Michigan, hereby agree to and with the publishers of The Daily Hotel Register, of Detroit, Michigan, as follows:

"That we will hand to each and every passenger, each and every day of the week (except Sundays), for the period of one year from the date hereof, a copy of the said The Daily Hotel Register, upon all incoming trains to Detroit; that is to say, upon the following trains, to wit:

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Canada S. R. R.	8:05 A. M.
" " "	1:05 P. M.
Michigan Central R. R.	11:50 A. M.
" " "	7:30 A. M.
" " "	9:20 A. M.
Toledo " "	8:00 A. M.
" " "	9:45 A. M.
Bay City R. R.	11:00 A. M.
Lake Shore R. R.	12:25 P. M.
Grand Rapids Exp.	11:50 A. M.
Lake Shore Exp.	10:00 A. M.

"In witness whereof we have hereunto set our hand this fifteenth day of September, A. D. 1888.

"UNION NEWS CO.,
"S. Dembitz, Mgr."

That the verbal portion was that the consideration was $35 per month, to be paid in advance each and every month; that the month for which payment was to commence should not begin to run until said newspaper should be delivered to said defendant for distribution. Such is the contract claimed to have been made, except that by mistake of the scrivener the defendant's residence is represented as being at Detroit instead of New York.

Plaintiffs aver that they paid defendant, on the execution of the contract, $35 in advance, and that the newspaper was published for the first time on September 22, 1888, and on the same day delivered to the defendant; that on October 22, thereafter, and ever since that time, the defendant has neglected and refused to carry out said contract on its part with the plaintiffs, although the plaintiffs have always been ready and willing on their part to perform the same, and have repeatedly tendered such performance. Plaintiffs claim large damages, and in their declaration specify the items.

Defendant pleaded the general issue,—

"With notice that the signature was fraudulently obtained by representing that the contract sued on was a letter, and not a contract."

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Also filed an affidavit denying the authority of Dembitz to make the contract.

The cause was tried before Judge Gartner, by jury, in the Wayne circuit, and the circuit judge held the contract as declared upon inadmissible in evidence, and directed the verdict for the defendant, and plaintiffs bring error.

The circuit judge held that the authority of Dembitz to make the contract mentioned in the declaration was not sufficiently shown, and this ruling raises the only question needing consideration in the case. Was there testimony in the case fairly tending to prove this local manager's authority? I think there was such testimony, and that the contract should have been received in evidence when offered. There is no question but that Dembitz had all the authority of a local agent for the defendant at Detroit, and to make the contract with the plaintiffs he did in parol; but it is claimed that his authority did not extend to the right to put the same in writing. The contract is shown by the evidence to have been within the apparent scope of his authority as local agent. The testimony shows that Walsh, without question, not only had the authority but could authorize the local agent to make the contract, even if the latter had not such authority. There is testimony tending to show that the local agent submitted the matter to Mr. Walsh, and took his advice in the premises before he made the written contract; and that Walsh afterwards said, substantially, that the contract was all right, and that he was willing to carry it out, but did not want it in writing, so that plaintiffs could show by it they had such a writing; that he wanted them to give up the writing, because it was offensive to some other parties with whom defendant was doing business.

There is no question but that Mr. Dembitz was mana-

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ger of defendant at Detroit, and in that capacity he signed the name of the defendant to the contract, and there is testimony that under its provisions defendant received and retained one month's pay promised and paid by plaintiffs under the contract, and there is testimony tending to prove that Dembitz and his clerk were the men doing the business for the defendant at Detroit; that Dembitz made the contracts for carrying the Evening News, to hire and put men to work, and to pay them, to supply them with stock, to receive their cash, and to discharge them, and settle with the men in the employment of defendant. I think, under such a state of facts, the extent of the authority of Dembitz to bind the company in making the contract sued upon should have been submitted to the jury; also whether or not the defendant ratified the contract in question; and in refusing so to do the circuit judge erred.

The judgment should therefore be reversed, and a new trial granted.

The other Justices concurred.

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FRANK W. CLARK AND ANN CLARK v. HIRAM N. LEE.

Fraudulent sale—Change of possession—Burden of proof—Charge to jury—Consideration illegal in part.

1. The burden of proof is upon the vendee to make it appear that the sale was made in good faith and without any intent to defraud the creditors of the vendor, where such sale is not followed by an actual and continued change of possession, and a refusal to so instruct the jury is error. *Buhl Iron Works v. Teuton*, 67 Mich. 623.

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2. In replevin by a vendee to recover a stock of goods seized at the suit of the vendor's creditors, the plaintiff relied upon his bill of sale as evidence of his title, the consideration for which he claimed was two chattel mortgages held by him on the property. The creditors claimed that one of the mortgages was given without any valuable consideration, and that the other was increased in amount, all with intent to defraud them, and with the knowledge of the vendee; and it is held a question for the jury, and, if found in favor of the creditors, the fraud tainted the whole transaction, and prevented a recovery by the plaintiff.

Error to Ionia. (Smith, J.) Argued October 15, 1889. Decided December 28, 1889.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Mitchel & McGarry, for appellant, contended:

1. Where a general verdict has been rendered upon a charge embracing an unsound theory, and where it is uncertain whether the error did or did not effect the result, the judgment must be reversed; citing *Warner v. Beebe*, 47 Mich. 435; and this result must also follow where the charge is vague and misleading, so that it cannot be told that there was a fair trial; citing *Loring v. Frue*, 104 U. S. 223.
2. The statute upon which the defendant relies makes a conveyance made with intent to defraud creditors void; citing How. Stat. chap. 234; and was designed solely to protect the rights of the creditors, and is silent upon the rights of the parties to the transaction itself.
3. Entire honesty and good faith are necessary to render an instrument valid, and whenever it appears, as in the present case, that part of its object was to defraud creditors, the whole instrument is in judgment of law void; citing *Russell v. Winne*, 37 N. Y. 591; *Goodhue v. Berrien*, 2 Sand. Ch. 630; *Shurtleff v. Willard*, 19 Pick. 202; *Chase v. Walker*, 26 Me. 555; *Barnet v. Fergus*, 51 Ill. 352; *Allen v. Brown*, 43 Ga. 305.
4. If a part of a consideration for a transfer is merely a nominal or colorable consideration, contrived to hinder, delay, or defraud creditors, the whole transfer is void; citing *Floyd v. Goodwin*, 8 Yerg. 484; *Burke v. Murphy*, 27 Miss. 167; *McKenty v. Gladwin*, 10 Cal. 222; *Mead v. Combs*, 4 C. E. Green, 112; *Albee v. Webster*, 16 N. H. 362; and if any part of an assign-

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ment be contrary to the statute for the protection of creditors against fraudulent transfers, the whole is void; citing *Goodrich v. Downs*, 6 Hill, 438; and illegality of consideration is a complete defense to the entire contract, though the consideration be in part valid; citing *Snyder v. Willey*, 33 Mich. 484.

5. A grantee who voluntarily becomes a party to a deed which is fraudulent in part forfeits his right to claim benefit from another part which would have been good; citing *Kirby v. Ingersoll*, Har. Ch. 172.

Davis & Nichols, for plaintiffs, contended

1. No complaint can be successfully maintained that the language used by the circuit judge (see opinion, p. 230) is not law, unless the facts, as found by the jury or conceded by the parties, show without question that the law as given cannot be applied to the facts of this particular case; citing *Pogodzinski v. Kruger*, 44 Mich. 79; *Campau v. Lafferty*, 50 Id. 114; *Dayton v. Monroe*, 47 Id. 193; *Brown v. Dean*, 52 Id. 267.

2. The language used being correct as an abstract proposition, it is essential to turn to the facts as established by the verdict, to ascertain if the court was in error in giving the instruction complained of, and if he should have instructed the jury that the burden of proof was on the plaintiffs, and that, by virtue of the statute, a presumption of fraud was raised, which they were obliged to overcome and explain away. The court gave the defendant's first and second requests in full, bearing upon this question, thus fairly placing before the jury the object and purpose of the statute. He then proceeded in the language of this Court to explain what change of possession was necessary; citing *Doyle v. Stevens*, 4 Mich. 93; *Sheldon v. Warner*, 26 Id. 403; *Cooper v. Brock*, 41 Id. 491; *Webster v. Bailey*, 40 Id. 641; *Carpenter v. Graham*, 42 Id. 191; and the question as to whether there was the change of possession contemplated was then very properly left to the jury, who found in the affirmative, and, thereupon, the charge complained of was correct, and applicable to this case.

3. The instructions given to the effect that the plaintiffs could recover if there was a *bona fide* debt, and a scheme or conspiracy did not exist, and the goods received did not exceed such debt,—and generally upon this phase of the case,—were a fair, full, and complete exposition of the law upon this branch of the case; citing *Andrews v. Fillmore*, 46 Mich. 315; *Bank v. Chapelle*, 40 Id. 447; *People v. Bristol*, 35 Id. 28; *Adams v. Niemann*, 46 Id. 135; *Nichols v. Bancroft*, 74 Id. 191.

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LONG, J. The defendant is the sheriff of Ionia county, and held the stock of goods in controversy in this cause under several writs of attachments and executions on judgments rendered in the circuit court for said county in favor of Edson, Moore & Co., W. D. Robinson & Co., and Olney, Shields & Co. against one Clarence E. Monroe. The plaintiffs, claiming to be the owners of the stock, brought replevin against the sheriff, and took the same into their possession under the writ, and on the trial of the cause had judgment.

On the trial of the cause, Frank W. Clark, one of the plaintiffs, was called as a witness for the plaintiffs, and testified that Ann Clark was his wife, and that the plaintiffs were doing business at Odessa, Ionia county, in the firm name of Frank W. Clark & Co.; that they were in possession of the stock of goods on November 9, 1886, and had been since October 19, previous; and that on November 9, 1886, the goods in question were taken from the possession of the plaintiffs by the sheriff, under such attachments and executions; that plaintiffs came into possession of the goods by bill of sale from Clarence E. Monroe, who had been in possession of them for some time previous. It was admitted that demand was made before suit was commenced, and that the damage for detention was six dollars. Plaintiffs here rested.

It was claimed on the part of defendant, and testimony was given tending to show the fact, that on April 29, 1886, Clarence E. Monroe, a young man, 23 years of age, and one Jotham Rickertson, a former clerk of Frank W. Clark, one of the plaintiffs in this case, formed a copartnership under the firm name of Monroe & Rickertson, and purchased from Clark, Russell & Co., doing business at Bonanza, Ionia county, composed of Frank W. and Ann Clark, plaintiffs herein, and James W. Russell,

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a stock of dry goods and groceries, for the sum of $800. Neither Monroe nor Rickertson put any money into the business. Payment was made by notes,—one for $400, payable six months from purchase, and four $100 notes, due one, two, three, and four years from that date, with interest at 7 per cent. Monroe assigned, as collateral security to these notes, an interest in a real-estate mortgage held by him on property in Rhode Island. About two weeks after this, Monroe & Rickertson bought of Frank W. Clark & Co., a firm composed of the plaintiffs in this case, a stock of boots and shoes, and, in payment therefor, gave a due-bill, without any security, for the sum of $605. The goods under each purchase were inventoried, and purchased, as it is claimed, under the inventory. After the purchase, Frank W. Clark wrote to different wholesale firms in regard to the standing of Monroe & Rickertson. Among others, he wrote to Edson, Moore & Co , one of the plaintiffs in the attachment suits, as follows:

"We have sold our stock to Monroe & Rickertson, who will conduct the business at the old stand. They will continue to buy their goods of you, and will be able to keep up their bills, as they have the stock clear, and money coming to them besides."

This letter was written May 6, 1886. These stocks of goods were in the store building of the plaintiff, and a verbal agreement was made between Frank W. Clark and Monroe & Rickertson for the renting of this building at $100 per year, and, as plaintiffs claim, for the period of four years, or until the last of the $100 notes became due. The business was carried on by Monroe & Rickertson in this shape until September 16 of that year, when Monroe took a re-assignment of the real-estate mortgage on the Rhode Island property, and went to Providence for the purpose of negotiating it. At the same time the firm of

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Monroe & Rickertson executed a chattel mortgage on the stock of goods purchased, for $1,600, to James W. Russell, to secure the firm of Clark, Russell & Co. It is claimed by defendant that up to this time $21 had been paid on the purchase, and that only $1,400 was then owing by Monroe & Rickertson; that they owed nothing but what was represented by the notes and due-bill. The chattel mortgage was drawn by Frank W. Clark; and Monroe testifies that the additional $200 was put in by Clark for the purpose of swelling the mortgage up to the value of the stock, to keep creditors away. Two weeks afterwards Monroe returned from Providence without any money, and appealed to Clark, as he testifies, to know what he should do, when Clark told him to continue on in the business, and to get Rickertson out, as he would not do as Clark wanted him to. At the same time, Clark suggested filling up the store with stock, and, in reply to Monroe's inquiry as to what the creditors would do, Clark stated that the mortgage would cover the stock, and that an assignment could be made, if necessary. Under this arrangement, the stock was increased to $2,200, with goods bought of various parties, including Edson, Moore & Co. and Olney, Shields & Co., two of the plaintiffs in the attachment suits. Under the same arrangement, Monroe got Rickertson out of the firm, on payment to him of $50. This was accomplished by intimidating him by fear of prosecution for selling tobacco without a license, if he remained longer in Bonanza. On the day of the dissolution of the firm, October 13, 1886, under the advice of Clark, as defendant claims, and to swell the amount of the indebtedness to keep off creditors, Monroe gave to plaintiffs in this case a further mortgage of $600 upon the stock. The alleged consideration of this mortgage was $200 "conscience money," claimed to have been mistakes in the inventories of the stocks of goods purchased by

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Monroe & Rickertson, and $400 for rent due and to become due for a balance of the term of four years, by the parol agreement. The figures on this "conscience money" were made by Clark, as Monroe testifies, without any agreement on his part, and that the amount left out of the inventory, and of which Clark was advised, was not more than $5; and at the time of the making of the mortgage Clark said he would call the balance "$400 rent." Monroe says that at this time Clark did not claim that he owed him more than the $800 and the $600 on the two purchases.

On October 19, 1886, plaintiffs bought Russell's interest in the $1,600 mortgage, and took an assignment; plaintiffs thus becoming the sole mortgage creditors of Monroe. On the same day they took from Monroe a bill of sale of the stock of goods and book-accounts for the alleged consideration of $2,200, the amount of the two mortgages. It is also claimed by defendant, and testified to by Monroe, that in buying goods, executing mortgages, notes, and bills of sale, Monroe followed the advice of Frank W. Clark; that the amount of goods bought by Monroe & Rickertson of outside parties up to the time of the execution of the bill of sale was $2,500, and the amount paid on these bills was from $1,200 to $1,500; that in the whole transaction Monroe received but $75, and Rickertson but $50; that the value of the stock at the time was $2,500. It is admitted that the bill of sale was not filed, and it is claimed by defendant that there was no visible change in the business after the execution of the bill of sale; Monroe remaining in charge and conducting the business as theretofore from the time of the execution of the bill of sale to the time of the levies under the writs, and taking possession by defendant.

The foregoing is the theory and claim of defendant,

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and is substantially what Monroe testified to. His testimony was corroborated in many particulars by that of Rickertson. Defendant also gave testimony showing that Monroe appeared to be in possession there of the stock after the bill of sale was executed, and the business going on as usual under him, and that there appeared to be $2,500 worth of goods in the store at that time.

The execution of the mortgages and bill of sale at the time stated is not disputed by the plaintiffs. Their theory is that the sale of the two stocks of goods to Monroe & Rickertson was made in good faith, and under an inventory taken by them, which was reported to be at $800 and $605, and for which amount the notes and due-bill were taken; that subsequently Monroe confessed that some $200 of the goods had been left out of the inventory, and which amount was added to the $400 rent, making up the $600 mortgage; that, at the time of the making of the bill of sale, Monroe was actually indebted to them in the sum of the two mortgages, $2,200, which was a *bona fide* debt. Frank W. Clark denies positively that these mortgages or the bill were given to cheat, hinder, delay, or defraud creditors, or that Monroe was acting under his advice in purchasing goods to swell the stock, or that the second mortgage was given to swell the indebtedness, to keep off creditors. Plaintiffs, also claim that the $400 for the four years' rent was an indebtedness, though under the verbal arrangement, which Monroe had a right to secure. It is also claimed by plaintiffs that they went into actual possession of the goods on the making and delivery of the bill of sale, and that they were in possession at the time the goods were seized under the attachments. On this question Mr. Clark testified, however, that Mr. Monroe had charge of the stock from the time of the bill of sale to the time the attachment was put on. Mr. Stowe, who acted for Mr. Clark, as his

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attorney, in settling up with Monroe and taking the bill of sale, also testified:

"I did not notice any change in the appearance of the institution after the bill of sale was made."

Mr. Monroe was then in the store, clerking, or acting as the agent of Clark in the business. Mr. Elliot, the agent of Edson, Moore & Co., when he went there, found Monroe in the store, and the business apparently continuing, as he says, as it did before. Plaintiffs also gave evidence, by one of the appraisers in the replevin case, that the inventory and appraisal so made showed the value of the goods to be only $1,124.

The theories of the respective parties were submitted by the court to the jury for their consideration.

Several errors are assigned, but counsel for defendant, in their brief, grouped them under two heads:

"1. Those relating to the rulings and charge of the court concerning the merits of the controversy.

"2. Those relating to the charge of the court concerning the burden of proof."

Under the second head, counsel asked the court to charge the jury:

"1. Our statute provides that every conveyance, in writing or otherwise, of any goods, made with the intent to hinder, delay, or defraud the creditors of their lawful suits, damages, debts, or demands, as against the creditors, or any of them, so hindered, delayed, or defrauded, shall be void.

"2. Our statute further provides that every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods by way of mortgage or security, or upon any conditions whatever, unless the same shall be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, and shall be con-

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clusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors.

"3. The change of possession contemplated by this section of the statute is an open, visible, substantial change, and must be such as to give the public notice that there has been a change in the ownership. Therefore, if the jury find that the pretended sale from Monroe to the plaintiffs was not accompanied by immediate delivery, and followed by an actual, open, visible, substantial, and continued change of possession, said sale is presumed to be fraudulent and void as against the creditors of said Monroe, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the plaintiffs that such sale was made in good faith, and without any intent to defraud such creditors."

The court gave the first and second of these requests, and added:

"Now, gentlemen, that is, in substance, that where the party transfers goods, and there is no change of possession, unless the same shall be accompanied by an immediate delivery, and to be followed by an actual and continued change of possession,—if that does not occur, stopping right there, the law raises a presumption of fraud, and, without any evidence, it must be held conclusively to be fraudulent. But, after the evidence is introduced as to the transaction, then it is for the jury to say, in view of all the testimony, whether that presumption is removed or not. As to what kind of a possession should occur to remove that presumption, our own Court uses this language: 'The change of possession contemplated is an open, visible, and substantial change, and must be such a change as to give notice to the public that there has been a change in the ownership.' If that occurs, then this presumption is removed,—then it is to say whether it is fraudulent or not."

In view of other portions of the charge, the court should have given the defendant's request as asked. It stated the law correctly, and connected Monroe and plaintiffs directly with the subject then being discussed, that Monroe must surrender possession, and Clark must take

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such actual, open, and visible possession, and that the same must be continued, or the same would be presumed to be fraudulent, and would be conclusive evidence of fraud, unless the plaintiffs should make it appear that the sale was made in good faith. Under the charge as asked, if the jury found there was no such open, visible, and continued change of possession, the burden was then cast upon the plaintiffs to show the *bona fides* of the transaction. Under the charge as given, following the second request to charge, the court entirely omitted this essential element, but left it to the jury to say, in view of all the testimony, whether the presumption was removed, and without any instructions as to where the burden of showing it rested.

Taking this instruction in connection with other portions of the charge as to the burden of proof, it may well be said that the jury might have been misled, as the court, in several portions of its charge, referring to the claim made by the defendant that the mortgages were fraudulent, and that the plaintiffs and Monroe had entered into a conspiracy to defraud the creditors of Monroe, had very properly directed the jury that the burden of showing this was upon the defendant.

Under the first proposition, it is claimed that the plaintiffs could not recover for two reasons:

"1. Because the proofs showed that the plaintiffs entered into a scheme with Monroe that Monroe should go on and purchase goods, fill up the store, not pay for the goods purchased in doing so, and then turn the stock over to Clark, and thus cheat the different parties from whom the purchases were made.

"2. Because the alleged indebtedness from Monroe to plaintiffs was fraudulently increased, by fictitious and improper charges, so as to make the apparent amount of the indebtedness equal the value of the goods in stock, in order to prevent the creditors of Monroe from realizing from that portion of the stock which exceeded the *bona fide* indebtedness to the plaintiff."

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It is claimed that the court adopted the first of these reasons, and charged the jury in effect as requested, but entirely discarded the other, and charged the jury that, if the amount of the goods received by the plaintiffs did not exceed the *bona fide* indebtedness, then the plaintiffs must recover. By the defendant's seventh request the court was asked to charge:

"The plaintiffs in this case rely upon their bill of sale from Monroe to them as the evidence of their title. If any part of the consideration of the said bill of sale was fraudulent and void, it would taint the whole transfer, and render said instrument entirely void, and the plaintiffs could not recover."

This request was refused, and the court charged upon that question as follows:

"So that, if the fraudulent intent existed in the mind of Monroe to swell the amount of this intebtedness above the actual amount, but still only enough goods were transferred to pay an actual and existing debt, it seems to me that, under the law in this case, that would be a fraud in intent and not in fact, because he would only be getting pay for an actual debt, and they [the plaintiffs] would be entitled to recover."

Under the testimony that had been given upon the part of the defendant, defendant's seventh request should have been given. The plaintiffs claimed the whole dealings to have been in good faith, and the consideration of the bill of sale, expressed as $2,200, to have been fully paid by the mortgages, and that the mortgages represented actual and *bona fide* claims due from Monroe & Rickertson. The claim of the defendant is that the only valid indebtedness for which these mortgages were given was two stocks of goods,—one for $800, and the other for $600,—and that the last or $600 mortgage was made for the purpose of defrauding creditors, and that the whole scheme was concocted and carried forward by Frank W. Clark. If the testimony of Monroe and Rickertson is to be

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believed, this is true. Clark contends that the $1,600 mortgage was made up of $62 interest on notes and due-bill, $90 money collected by Monroe & Rickertson for Clark, Russell & Co., $50 for use of team and wagon, and the value of the two stocks of goods,—one at $800 and the other at $600,—while the $600 mortgage was made up of the $400 item of four years' rent of store, though less than one year had expired, and Monroe was about to go out of business, if his testimony is true, and the $200 of false inventory, or, as it is called, "conscience money," though Monroe testifies that that amount was never agreed upon, and the discrepancy was only about $5. It was a question of fact for the jury whether this mortgage was increased to $1,600, and the $600 mortgage fraudulently given, to hinder, delay, or defraud the creditors of Monroe; and, if they found that Clark entered into this scheme with Monroe, as Monroe testifies he did, and the bill of sale was taken by Clark for the purpose of carrying out the scheme, such fraud would taint the whole transaction, so that no claim could be made by Clark under the bill of sale, and he could not recover.

What rights the plaintiffs may have for the amount honestly and actually due them on the chattel mortgages need not be determined here. If it is found that the title did not pass to the plaintiffs under the bill of sale, so as to affect the rights of the creditors of Monroe to take possession of the goods under their writs, the fact that the plaintiffs had rights under the mortgages would not debar the attaching creditors from taking possession, and bringing the goods to sale, subject to such valid claims as the plaintiffs might have.

For the errors pointed out the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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FRANK A. SESSIONS v. WILLIAM C. B. SHERWOOD.

Ejectment—Homestead—Defendant's wife a necessary party—Mortgages—Presumption of delivery—Validity—Res judicata—Estoppel.

1. Where a mortgage is executed in the absence of the mortgagee, and placed upon record by the mortgagor, and permitted to remain of record as a mortgage, and assumed to be such by all of the parties in interest, want of a manual delivery is of no importance. *Jackson v. Cleveland*, 15 Mich. 94. Such recording, in the absence of evidence to the contrary, is presumptively a delivery. *Patrick v. Howard*, 47 Mich. 40-45; *Stevens v. Castel*, 63 Id. 116, 117; *Gage v. Gage*, 36 Id. 229.

2. Especially is the recording of a deed considered presumptively a delivery of it, as between the grantor and grantee, when the object of the record is to defraud, hinder, or delay creditors. *Gage v. Gage*, 36 Mich. 229.

3. In this case the defendant is held estopped from claiming that two mortgages executed by him for the purpose of preventing the collection of claims by creditors were void for want of consideration and delivery, the same having been recorded, and foreclosed after the death of the mortgagee by his personal representative, who bid in the land for the estate, and thereafter caused it to be sold at administrator's sale to the plaintiff, an innocent purchaser, who brought ejectment against the mortgagor, who had remained in possession of the premises, and who sought to defeat a recovery on the grounds stated.

4. A wife is a necessary party to an action of ejectment involving her homestead rights. *Hodson v. Van Fossen*, 26 Mich. 68; *Cleaver v. Bigelow*, 61 Id. 47; *Sewing Machine Co. v. Whitney*, Id. 518.

Error to Gratiot. (Hart, J.) Argued October 15 and 16, 1889. Decided December 28, 1889.

Ejectment. Defendant brings error. Judgment affirmed as to 80 acres, and reversed as to 40 acres. The facts are stated in the opinion.

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S. J. & J. G. Scott, for appellant, contended:

1. Title to land is only transferred by deed duly executed and *delivered;* citing How. Stat. § 5652; *Gugins v. Van Gorder*, 10 Mich. 523; *Hunter v. Hopkins*, 12 Id. 227; *Boothroyd v. Engles*, 23 Id. 19, 21; *Hayes v. Livingston*, 34 Id. 384, 391; *Bank v. McAllister*, 46 Id. 397, 401, 402; and such delivery is as essential as any other ceremony; citing *Green v. Langdon*, 28 Mich. 221; *Heffron v. Flanigan*, 37 Id. 274; *Ritter v. Ritter*, 42 Id. 108.

2. The object of delivery is to indicate the grantor's intention to give the deed effect as a conveyance; citing 3 Washb. Real Prop. (5th ed.) 300; *Maynard v. Maynard*, 10 Mass. 456; *Hatch v. Hatch*, 9 Id. 307; *Woodbury v. Fisher*, 20 Ind. 387; *Utterbach v. Binns*, 1 McLean, 242.

3. Both delivery by the grantor and acceptance by the grantee are necessary, because both are essential to show union of mind; citing *Hendricks v. Rasson*, 53 Mich. 575; *Watson v. Hillman*, 57 Id. 609; *Wiggins v. Lusk*, 12 Ill. 132; *Hadlock v. Hadlock*, 22 Id. 384; *Wilsey v. Dennis*, 44 Barb. 359; *Fonda v. Sage*, 46 Id. 123; and proof of acceptance, subsequent to the act of constructive delivery, without proof of consent of grantor, is not sufficient to give effect to the deed; citing 3 Washb. Real Prop. (5th ed.) 310; *Brown v. Cannon*, 5 Gil. 177; *Buffum v. Green*, 5 N. H. 71; *Barns v. Hatch*, 3 Id. 304; *Church v. Gilman*, 15 Wend. 656; *Thatcher v. Church*, 37 Mich. 268, 269; *Woodbury v. Fisher*, 20 Ind. 387.

4. Delivery may be presumed from possession or from recording, both having been held *prima facie*, but not conclusive, evidence thereof; citing *Ritter v. Ritter*, 42 Mich. 108, 109; *Hendricks v. Rasson*, 53 Id. 575; *Watson v. Hillman*, 57 Id. 609; but the presumption of delivery of the first mortgage in this case, from the fact of registry, is conclusively rebutted by the findings of fact.

5. Recording is not delivery, nor a substitute for it; and when the grantee is shown to have been absent at the time of execution of the deed, the presumption of delivery is rebutted; citing *Maynard v. Maynard*, 10 Mass. 456; *Hatch v. Hatch*, 9 Id. 307; *Gilbert v. Ins. Co.*, 23 Wend. 43; *Jackson v. Phipps*, 12 Johns. 418; *Keirsted v. Avery*, 4 Paige, 9; *Hendricks v. Rasson*, 53 Mich. 575; *Watson v. Hillman*, 57 Id. 609; *Wiggins v. Lusk*, 12 Ill. 132; *Hedge v. Drew*, 12 Pick. 141; *Powers v. Russell*, 13 Id. 77, 78.

6. To make a delivery at the office of the register of deeds good to transfer title there must be proof of the assent of the

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grantee; citing *Maynard v. Maynard*, 10 Mass. 456; *Jackson v. Phipps*, 12 Johns. 418; *Hendricks v. Rasson*, 53 Mich. 575.

7. Unless the court is authorized to create a distinction between conveyances upon a valuable consideration and voluntary conveyances, in respect to the ceremony necessary to complete the conveyance, which it is submitted cannot be done, neither of these mortgages took effect as such; citing *Jackson v. Phipps*, 12 Johns. 418; *Ladue v. Railroad Co.*, 18 Mich. 380-400; *Burson v. Huntington*, 21 Id. 430-432; 3 U. S. Dig. (N. S.) 304.

8. The estate of Warren B. Sherwood never became vested with any title or interest under said mortgages, and as purchasers at a judicial sale take just such and only such interest as the person or estate held, it necessarily follows that plaintiff succeeded to no title or estate under the administrator's conveyance; citing Sedg. & Wait, Trial, etc., § 822; Rorer, Jud. Sales, 459-462; 3 Washb. Real Prop. (5th ed.) 321; *Tisher v. Beckwith*, 30 Wis. 55; *McGoren v. Avery*, 37 Mich. 120.

Mitchel & McGarry, for plaintiff, contended for the doctrine stated in the opinion, except as to the necessity of defendant's wife being made a party.

MORSE, J. This is an action of ejectment. Plaintiff claims title to 120 acres of land in Gratiot county by virtue of certain mortgage foreclosures by advertisement. The case was tried before Hon. Henry Hart, circuit judge, without a jury, who made findings of fact and law, and gave judgment for plaintiff.

The judge finds that the defendant came into possession of these premises March 2, 1865, by a warranty deed from one George, who was then the owner in fee, deriving his title through mesne conveyances from the United States. February 13, 1867, the defendant executed a mortgage, in which his wife did not join, upon 80 acres of this land, the E. ½ of the S. E. ¼ of section 2, township 11 north, of range 3 west, and other lands not involved in this suit, to his brother, Warren A. Sherwood. When this mortgage was made Warren A. Sherwood was not present. It was made in his absence, and

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taken to the register's office, and put upon record by the defendant. The mortgage was made to protect the defendant and his property from litigation, in which defendant was fearful he might get involved through a partner of his, who was having a lawsuit; in other words, the mortgage was made and put upon record to prevent creditors, or persons who might in this litigation be adjudged creditors, from levying on this land. This mortgage was found in the register's office by A. G. Russell, administrator of the estate of Warren A. Sherwood, appointed by the probate court for the county of Ionia, Michigan. Warren A. Sherwood died March 27, 1876, at St. Louis, Missouri. This mortgage, containing the usual power of sale, was regularly foreclosed by advertisement under the statute, and the land purchased by William Reynolds, administrator of Warren A. Sherwood's estate, succeeding Russell. A sheriff's deed was made upon such sale to Reynolds. The premises were not redeemed, and the deed became absolute.

The court further finds that December 20, 1870, the defendant, William C. B. Sherwood, with his wife, executed a mortgage to Warren A. Sherwood for $2,000 upon the 120 acres involved in this suit, containing the usual power of sale, which mortgage was recorded December 23, 1870. This mortgage was also regularly foreclosed by advertisement after the death of said Warren A. Sherwood, and purchased by his administrator, Reynolds. Sheriff's deed was executed on this sale, and, for want of redemption of the premises, became absolute. Reynolds was appointed administrator of Warren A. Sherwood by the probate court of Ionia county, Michigan, and February 14, 1885, he petitioned said court for license to sell the lands in question. He was granted such license, and October 6, 1885, the premises were sold to plaintiff for $2,600, and he received a deed of the same.

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The proceedings on foreclosure and in the probate court are not attacked, but are conceded to be regular; but it is claimed that these mortgages were without consideration, and invalid. The circuit judge finds as to the $2,000 mortgage, Warren A. Sherwood was present when it was executed; but, while they were talking it over, it was found that the wife of defendant had objections to signing it, as it covered the homestead. It was then agreed to lay it aside, and, instead of the mortgage, to make a deed of the north 80 acres of the land, which was done, and the deed delivered to Warren A. Sherwood, which deed was understood and intended to be taken in the place of the mortgage, which was not intended to be delivered, although it was handed to Warren A. Sherwood, who looked it over.

It does not appear in the record how this mortgage came to be recorded three days after it was made, or by whom, or for what purpose, it was recorded, or how it came into the hands of Warren A. Sherwood's administrator. It is rather singular that a mortgage, not intended to be delivered by the parties, and superseded by a deed made in its stead, should have so soon found its way to the register's office, unless taken there by one of the parties, or that it should have been recorded at all unless some purpose was to be subserved by such record. But the secret of this transaction is also found in an intent to defraud or hinder and delay creditors. The judge finds that the agreement not to use the mortgage, and to make the deed instead, was done after Mr. Hayes, an attorney, had advised them that the 40 acres they lived upon was exempt from levy and sale on execution. He also finds that there was no money paid that day, and defendant was not indebted to Warren, except for $300, which he had collected for, but had not paid over to, Warren, and another mortgage was afterwards given to secure this

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amount. This mortgage of $2,000 was given because there was an execution against defendant, and in favor of William Stanley, to assist defendant in avoiding payment of such execution.

The foreclosure sales under these mortgages took place December 24, 1880. A bill in chancery was filed September 8, 1881, in the circuit court for the county of Gratiot by the defendant in this suit, William C. B. Sherwood, against William H. Reynolds, administrator, and the heirs of Warren A. Sherwood, deceased, in which said William set up that the first mortgage of $600 was never delivered to Warren, and that it was made to provide against a possible result of litigation in which his partner was engaged, and in which he was threatened to be involved also, but that it was not made or recorded with any design of defrauding, hindering, or delaying any creditors of William. In relation to the $2,000 mortgage, he alleged the same facts as found by the circuit judge in the present suit, and, further, that the mortgage was taken into the possession of Warren, and by him caused to be recorded, without his knowledge or assent, and contrary to the understanding between the parties. He also alleged that there was no consideration for or delivery of either of these mortgages; that he was in the possession of the premises, but that he had temporarily parted with the legal title to the same upon certain trusts and charges, which were then completely and fully ended; and that he was entitled to, and soon would be re-invested with, such legal title.

The administrator and heirs of Warren answered, denying the allegations of William, and averring the delivery and full validity of both mortgages; and, at the close of the answer, by way of demurrer, set up that complainant had no right to bring his suit, for the reason that his bill showed he had no legal title to the land, and it did

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not appear in said bill that he had any equitable title to the premises. Proofs were taken by both parties bearing on the validity of the mortgages, as well as upon the matter of abatement, and the case was argued on the merits. October 5, 1883, the court, the same circuit judge who tried the case at bar, filed the following opinion, and dismissed complainant's bill:

"In this case I do not think the complainant can recover, and the bill should be dismissed, with costs. I do not think the complainant has such a title as will enable him to maintain this suit in his own name, and I think the issue is sufficiently raised by the answer in the clause denying either legal or equitable title, in answer to that clause of the bill which shows the title claimed by the complainant. HENRY HART, Circuit Judge."

The decree was dated as of the date of the hearing, September 14, 1883, and the dismissal of the bill was absolute. The defendant in this case and complainant in that case made a motion for rehearing, which was denied June 14, 1884. No further steps were ever taken by the defendant, William C. B. Sherwood, to attack the validity of these mortgages, or the foreclosure of the same, until he defended the present suit. He and his wife, however, have occupied and remained in possession of the premises ever since; the homestead being on the S. E. ¼ of the S. E. ¼ of section 2, township 11 north, of range 3 west. There are about 70 acres of land improved, upon which is a dwelling-house and barn.

It is contended by defendant's counsel that under the findings of fact by the circuit judge, there was no delivery of either of these mortgages, or any consideration for them, and that the chancery suit was not a bar to the right of the defendant now, and in this suit, to question their validity, and that, therefore, the judgment upon the findings of fact should have been for the defendant. The

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counsel also claim that the wife of Sherwood should have been made a party.

I am inclined to hold that the chancery suit was not determined on the merits, but on the fact that Sherwood's title, as shown by his bill and the proofs in the case, was not such as enabled him to ask for the relief prayed. This is shown by the opinion filed in the case, and made a part of the judge's finding in this case. But the bill was dismissed absolutely, and, had not this opinion been filed by the circuit judge, stating his reasons for so doing, such dismissal would have been, without doubt, a bar to any further proceedings to test the validity of these mortgages, or any future defense against them on the ground that they were not delivered and were without consideration. As to the bearing of this decree of absolute dismissal upon the present case, I shall speak hereafter. I am satisfied, however, that the plaintiff is entitled to a judgment, beyond any question, as far as the defendant's interest is concerned, outside of the homestead, in the lands covered by the $600 mortgage, which would be the N. E. ¼ of the S. E. ¼ of section 2, township No. 11 north, of range 3 west. Plaintiff is entitled to this 40. And I am also of the opinion that he is entitled, under the findings of fact, to a judgment for the whole premises, or would have been if the wife had been made a party defendant.

The circuit judge finds, in effect, that the first mortgage was made for the purpose of providing against the seizure of the land therein described for some judgment that might be obtained in litigation then pending against the defendant's partner in business, and in which defendant expected to be involved. He put it upon record himself. Not only that, he allowed it to remain in the register's office from 1867 until after Warren Sherwood's death, in 1876,

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nearly, if not quite, 10 years, and then informed the administrator where it was, who went and got it without any protest from defendant appearing from the findings of fact. All the finding there is as to delivery is simply that it was taken by the mortgagor and put on record, and made in the absence of Warren. The judge does not find that there was no consideration for it, or that it was not accepted by Warren; and, it being put on record, and permitted to stand on the record as a mortgage, and assumed to be a mortgage by all concerned, the fact that it was originally made without the knowledge of Warren, and that there never was a manual delivery of it, is of no importance. *Jackson v. Cleveland,* 15 Mich. 94. This putting of the mortgage on record, in the absence of any testimony or finding to the contrary, was presumptively a delivery. *Patrick v. Howard,* 47 Mich. 40–45 (10 N. W. Rep. 71); *Stevens v. Castel,* 63 Id. 116, 117 (29 N. W. Rep. 828), and cases cited; *Gage v. Gage,* 36 Id. 229; Jones, Mortg. § 539; *Jackson v. Cleveland,* 15 Mich. 94. Especially is the recording of a deed considered presumptively a delivery of it, as between grantor and grantee, when the object of the record, as in this case, is to defraud, hinder, or delay creditors. *Gage v. Gage,* 36 Mich. 229; *Moore v. Giles,* 49 Conn. 570.

In the case of *Stevens v. Castel, supra,* there was an evident intent, expressed at the time of recording, not to deliver the deed. In this case the action of William C. B. Sherwood after the mortgage was recorded is in support of the presumption of delivery afforded by the fact of record; and the defendant cannot now be heard to say that there was no consideration for this mortgage, because it was given to stave off or defraud creditors. Such a defense will not be permitted. *Jackson v. Cleveland,* 15 Mich. 94; *Gage v. Gage,* 36 Id. 229; *Hess v.*

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Final, 32 Id. 515; *Gunderman v. Gunnison*, 39 Id. 313, 317; *Cool v. Snover*, 38 Id. 562, 565.

And as to the other mortgage of $2,000, it was given in the first place, and executed by the wife as well as the husband, to prevent the levy upon the premises of an execution already issued and out against the defendant. This mortgage, though not delivered, as found by the circuit judge, was recorded by somebody December 23, 1870. It remained on record until Warren Sherwood's death, in 1876, presumably with the knowledge of the defendant, and was found among Warren's papers at his death. The length of time it was on record, and the purpose for which it was executed, with the fact that it was in Warren's possession at the time of his death, is quite conclusive to my mind that the defendant either put it upon record himself or consented that Warren should record it. *Hess v. Final*, 32 Mich. 515.

Under all these facts and circumstances, what is the position that the parties occupy? The defendant, for the purposes of hindering or defrauding creditors, executed two mortgages to his brother, Warren A. Sherwood. One remains of record nine years; the other, six years and upwards. One he places on record himself, as he probably does the other. His brother dies in 1876. One mortgage is found in the register's office, the place of its deposit being pointed out by the defendant; the other is found among the papers of the deceased. These mortgages are held by the administrator of Warren until 1880, when they are foreclosed by advertisement, and bid in for the estate, December 24, 1880. Ten years in one case, and thirteen in the other, have passed, and yet the defendant makes no sign of dissent as to their validity. In September, 1881, after he has voluntarily parted with the legal title to these lands, he files his bill in chancery, attacking for the first time the liens of these mortgages,

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which liens he himself placed upon the premises, and for the purpose of having them appear as valid and subsisting liens. In 1883, after proofs taken, and a full argument upon the merits of his claim, his bill is dismissed absolutely. After making a motion for a rehearing, which was denied in 1884, the defendant rests, and the decree stands. In 1885, by regular proceedings in the proper probate court, the lands were sold as the property of Warren A Sherwood's estate to the plaintiff.

The plaintiff, attending the probate sale, finds these two mortgages regularly executed and recorded for the length of time above stated. He finds that the defendant in 1881 attacked their validity in chancery, and that, after a full investigation upon the merits, the court dismissed his bill absolutely, from which decree there has been no appeal. The opinion filed by the court was no part of the record, and the plaintiff might well understand that, by buying the premises at the probate sale, he was acquiring all the title that William C. B. Sherwood had at the date of both mortgages, and all the interest the wife had at the time of the execution of the second mortgage. The plaintiff pays $2,600 in cash, supposing, as he had a right to suppose, under the appearances, for which the defendant is responsible, that he was purchasing a good title to these lands. Under these circumstances, is not the defendant now estopped from coming into a court of law, and claiming that these mortgages were never delivered, and were without consideration, being executed between him and his brother to preserve the premises from the claims of defendant's creditors? It is plain to my mind that he is, and that, if any one must lose by the defendant's transactions with his brother, it must be himself, and not the plaintiff, who in good faith has parted with his money upon the appearances of the record title, which appearances have

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been made by the acts and conduct of the defendant alone, as far as can be discovered from the facts before us in this case.

But as far as the homestead is concerned,—the S. E. ¼ of the S. E. ¼ of section 2, township 11 north, of range 3 west,—the wife, under our decisions, should have been made a party. *Hodson v. Van Fossen*, 26 Mich. 68; *Cleaver v. Bigelow*, 61 Id. 47 (27 N. W. Rep. 851); *Davis Sewing Machine Co. v. Whitney*, Id. 518 (28 N. W. Rep. 674).

As to the other 80 acres, the judgment should be affirmed. Judgment for the homestead 40 for defendant, with costs of this Court to him; costs of lower court to plaintiff. The record will be remanded for further proceedings, if desired.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred with MORSE, J.

CAMPBELL, J., *(dissenting)*. Plaintiff brought ejectment as purchaser, under probate license, of the interest of the estate of Warren A. Sherwood, deceased, derived by statutory foreclosure, by the administrator, of two alleged mortgages made by defendant to decedent. The case comes up on findings of fact, showing defendant to have a good title unless bound by the foreclosures which make up all of plaintiff's title. The circuit court for Gratiot county gave judgment for plaintiff.

The findings are that defendant, whose wife did not join with him, made, February 13, 1867, to Warren Sherwood, a mortgage for $600 on 80 acres, including part of the premises demanded, and that William Reynolds, the administrator of Warren Sherwood, bid it in at a foreclosure sale, regular in form, on December 24, 1880. The court below finds this mortgage was made for the purpose of guarding against an unfounded lawsuit, and

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was never delivered to Warren A. Sherwood during his life, but was obtained from the registry by an administrator, after his death. There is no finding that any debt existed under it, and no finding that Russell, the administrator, or any one else, ever held any debt or security covered by it, or that any condition required by statute existed which would authorize foreclosure. The finding negatives any such right. The other alleged mortgage was dated December 20, 1870, to secure a negotiable note of $2,000. The court finds that no consideration existed, and no money was due to Warren but $300, which was provided for in another way; that the $2,000 mortgage was never delivered, and it was understood it should not be delivered, and another arrangement was made to subserve the same purpose, which was not to secure anything to Warren, but to prevent adverse action by others. It is therefore positively found that there never existed any such mortgage as the $2,000 mortgage for any legal purpose, and that the smaller mortgage secured nothing, and constituted no legal incumbrance against the property.

If the case stopped here, there could be no plausible reason for suggesting that anything passed by foreclosure. A statutory foreclosure is an *ex parte* proceeding by the mortgagee, which can be of no force unless there is a valid mortgage and a valid power of sale, exercised upon some actual default. How. Stat. § 8498. The fact that the notices and sale are regular does not make the mortgage good. Its existence and validity are jurisdictional prerequisites, and a mortgage, like any other deed, requires that it be executed and delivered, and it is also necessary that some obligation shall exist in which default occurs. While indulgence may be shown to mere slips of form, involving no serious consequences, there can be no valid foreclosure without a valid mortgage, with an auth-

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ority to sell on default. This doctrine is universally recognized, and is hardly disputed. There is nothing judicial in the proceedings. The mortgagee determines for himself whether, and when, he will foreclose, and he must show his right when disputed.

But it is claimed certain chancery proceedings appear in the record which operate as an estoppel, and which the court below, expressing doubt, concluded to so regard. In September, 1881, defendant, Sherwood, filed a bill against the administrator and certain alleged heirs of Warren A. Sherwood, setting up the invalidity of these proceedings, and asking to have them set aside. The administrator and part of the heirs answered, raising issues of fact, and, on information and belief, averring the validity of the mortgages and proceedings. The answer further relied on the ground that the bill did not show that complainant held the equitable title to the land, and did show that he did not hold any legal title, and that no such interest appeared in the bill as showed any right of suit. The further objection was made that it appeared from the bill that necessary parties were omitted. Replication was filed, and proofs taken. The bill was dismissed on the hearing. The decree contains no statement why it was dismissed, but an opinion filed in the case holds briefly that it was to be dismissed because complainant showed no title, legal or equitable.

Under our practice a claim of jurisdictional or substantial defects in a bill, if not made by demurrer, but inserted in the answer, comes up for disposal at the final hearing. In deciding suits in equity, it is not usual to go to the general merits, if there is such a radical defect in the bill as shows there is no occasion for it; and, when a bill is dismissed, and the answer sets up defects which should cause its dismissal, without reference to the facts in dispute, it cannot be presumed that the case went off

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on the facts. What presumption might exist if no such point was raised, and if no opinion was filed, we need not consider. Neither need we consider what effect is to be given to an opinion, standing alone. There is no rule of estoppel which will make a decree conclusive on any issue that the record does not indicate must or should have been passed upon. The rule always applied by the United States Supreme Court in determining whether a state court has decided adversely on a right under the laws of the United States is not whether it might have been involved in the issues, but whether it appears to have been a ground of decision. This is the only sensible and just rule, and it applies still more forcibly when an attempt is made to give the force of a conclusive finding to what may never have been considered at all. There is no general rule that a decree in equity against a complainant bars his legal or other remedies. In many cases a bill is dismissed because there is a legal remedy; and there are cases frequently arising where equity prefers to leave parties to their legal redress entirely. This Court has passed upon the question of the conclusiveness of a decree on that principle. *Adair v. Cummin*, 48 Mich. 375 (12 N. W. Rep. 495); *Blake v. Hubbard*, 45 Id. 1 (7 N. W. Rep. 204); *Goodrich v. White*, 39 Id. 489; *Bonker v. Charlesworth*, 33 Id. 81; *Gamble v. East Saginaw*, 43 Id. 367 (5 N. W. Rep. 416); *Peters v. Hansen*, 55 Id. 276 (21 N. W. Rep. 342); *Nims v. Vaughn*, 40 Id. 356; *Wheeler v. Hatheway*, 58 Id. 77 (24 N. W. Rep. 780).

We think the finding is in favor of the defendant, and judgment must be reversed, with costs of both courts, and judgment rendered in his favor, and the record remanded for such future action as may be lawful under the statutes.

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WILLIAM KILLEFER AND SUSAN S. BRIGGS, EXECUTORS, ETC., v. JOHN C. McLAIN ET AL.

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[See 70 Mich. 508.]

Partnership — Surviving partner a trustee — Administration — Accounting.

1. A surviving partner becomes a trustee for the representatives of the deceased partner, for the firm creditors, and for himself, and is held strictly as such, and his conduct in discharging his trust is carefully looked after by courts of equity. It is his duty as trustee to keep correct and accurate books of account, which shall show what property he holds in trust, and what disposition he makes of the same. *Perrin v. Lepper*, 72 Mich. 454; *Heath v. Waters*, 40 Id. 464.

2. A surviving partner who obtains the full control of affairs by investing himself with the administration of his deceased partner's estate, assumes new duties and liabilities as a trustee, which facts call for closer scrutiny, and for the application of that wholesome rule that where he has neglected to account for the assets he may be charged with their highest value which the proofs show, and for all rents and profits which he might by judicious management have received without neglect or default; or he may be charged with interest upon the deceased partner's capital. Pars. Partn. 521, note *f*.

Appeal from Van Buren. (Buck, J.) Argued October 30, 1889. Decided December 28, 1889.

Bill for partnership accounting. Defendants appeal. *Decree* reversed, and new decree entered. The facts are stated in the opinion.

Howard & Roos, for complainants.

Crane & Breck, for defendants.

CHAMPLIN, J. When this case was before us in June, 1888, we indicated the law which should be applied to

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the facts, and the method of accounting which should be pursued. We adhere to the opinion then expressed. 70 Mich. 508 (38 N. W. Rep. 455). The directions given for the accounting have not been followed, and no account has been stated in accordance with that opinion.

Emory O. Briggs and Charles G. Nash signed partnership articles bearing date January 2, 1882. They conducted business under the firm name of Briggs & Nash until August 6, 1882, when Nash died. September 14, 1882, Emory O. Briggs was appointed administrator of the estate of his deceased partner, and made and filed an inventory. Commissioners on claims were either appointed or the claims were allowed by the probate court on March 14, 1883, in favor of defendants Sherman, Sellick, and Stevens. August 6, 1883, Briggs, as administrator, filed a petition in the probate court for leave to file an amended inventory. He did nothing further towards the settlement of the estate after setting out to the widow her statutory allowance. He continued until his death, which occurred in 1885, to carry on business in the firm name of Briggs & Nash, and handled the firm assets as he chose. After his death his executors managed the estate, and in the fall of 1885 filed the bill of complaint in this cause for an accounting and settlement of the partnership affairs of Briggs & Nash, making the administrator of Nash, who was appointed since the death of Briggs, the widow, the only heir, and the three creditors above named, parties.

The decree entered in this Court when the cause was here was to the effect that the whole of the real estate put into the firm of Briggs & Nash by the respective partners constituted firm assets for the payment of partnership debts, and also holding that the individual creditors of Nash had priority as to payment over the debts of the partnership to Briggs or his estate from the assets

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of the firm. It was ordered that the cause be remanded to the court below, and that further proofs be taken under the interlocutory decree, and that an account must be taken and stated before the circuit court commissioner showing the assets and liabilities, gains and losses, receipts and disbursements, made by the firm of Briggs & Nash up to its dissolution by the death of Nash, and the state of the account between the respective partners and the firm at the time of dissolution; and also showing what debts have been paid by the surviving partner, and when paid, and what he has done with the assets of the firm.

The commissioner to whom the matter was referred has made a report, or "findings," as they are called, but he has stated no account. He states therein that "no evidence was produced showing what E. O. Briggs has done with the assets of the firm of Briggs & Nash." But he further finds that—

"Emory O. Briggs in his life-time did, by mortgage and otherwise, dispose of the entire one-half interest in all the real estate in question to which he had the title; and that he never accounted to C. G. Nash, nor to the estate of said Nash, nor to any one else in any way or manner interested in the estate of said Nash, therefor, nor of any part thereof, unless he paid partnership debts as herein stated, and that it is impossible to ascertain just what sum he realized therefor."

The surviving partner, Emory O. Briggs, upon the death of his partner, Nash, became a trustee for all concerned in the partnership,—for the representatives of the deceased partner, for the creditors of the firm, and for himself. His trust was to wind up the concern in the best manner for all interested, and therefore without unnecessary delay, and his powers were such to enable him most effectually to execute the trust. Pars. Partn. 479 (441). It is said (Id. 442) that—

"The surviving partners are held strictly as trustees,

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and their conduct in discharging their trust is carefully looked after by courts of equity."

It is their duty as trustees to keep correct and accurate books of account, which shall show what property they hold in trust, and what disposition they make of the same. *Perrin v. Lepper*, 72 Mich. 454 (40 N. W. Rep. 859); *Heath v. Waters*, 40 Id. 464. Indeed, the partnership agreement between these partners required the same thing. It was, furthermore, his duty to get in and pay the firm debts, and the debts he got in should have been placed to the debit of the late firm, and the debts he paid should have been placed to its credit. 2 Lindl. Partn. 591.

In this case not only was Emory O. Briggs in his capacity of surviving partner a trustee, but he invested himself with the administration of his deceased partner's estate, and thus assumed new duties and liabilities as a trustee, and thus brought his own personal interest as surviving partner into direct conflict with his duty as administrator. In this manner he obtained the full and unrestricted control of affairs, and prevented investigation into his manner of conducting the business. These facts call for closer scrutiny, and the application of that wholesome rule that where he has neglected to account for the assets he may be charged with their highest value which the proofs show, and for all rents and profits which he might by judicious management have received without neglect or default; or he may be charged with interest upon the deceased partner's capital. Pars. Partn. 521, note *f*.

Counsel for complainants insisted, upon the argument before us, that it was impossible for them to make any better or different showing than they had done. We are left, therefore, to direct a decree here which shall end this controversy, and to frame it upon such principles as

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shall secure, as near as we can do, the rights of the parties. As it is impossible to inform us what the assets realized, we must pursue the other course, and take the capital as a basis of settlement. There is no difficulty in ascertaining the amount of capital each partner had in the concern, both at the time the partnership commenced and when it terminated. The amount was agreed upon between the parties, and we shall take their statement as evidenced by the partnership agreement and schedules. The assets had not materially changed at the time of Nash's death, and no new debts are shown to have been made. The business shows a small gain, and no losses. Their combined capital exceeded their combined liabilities $6,346.79. Nash's capital put into the concern exceeds Briggs', $876.28. Hence Nash's net capital in the concern was $3,611.53, and Briggs', $2,735.25. We shall take this net capital of Nash's as a basis, and allow interest upon it as below. Upon Nash's death he owed the following individual debts, viz.: One note dated January 4, 1882, of $1,150, drawing interest at 8 per cent., due to F. E. Stevens; one note dated January 1, 1882, of $544.40, drawing interest at 10 per cent., due to A. Sherman; one note dated January 1, 1880, of $528, drawing interest at 8 per cent., due W. J. Sellick. The principal and interest on these notes to December 26, 1889, amount to the following:

F. E. Stevens, principal	$1,150 00	
Interest	726 28	
		$1,876 28
A. Sherman, principal	$ 544 40	
Interest	430 22	
		974 62
W. J. Sellick, principal	$ 528 00	
Interest	418 21	
		946 21
Total		$3,797 11

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Interest will be computed upon above net capital in sums equal to the principal of these notes, respectively, at the same rate of interest, making, with interest		$3,797 11
And the balance, $1,389.13, will draw interest at 7 per cent. from date of articles, namely	$1,389 13	
Interest	776 48	
		$2,165 61
		$5,962 72

The assets put into the firm will be treated and decreed to belong to the estate of the surviving partner, so far as not disposed of in his life-time, subject to the payment of the partnership debts; but before such debts are paid the executors of the estate of Emory O. Briggs must pay to the defendant John C. McLain, as administrator of the estate of Charles G. Nash, deceased, the sum of $5,962.72, which amount will draw interest at the rates above mentioned from day of the filing of this opinion. The defendants will recover their costs of both courts.

The decree of the circuit court is reversed, and a new decree will be entered here in accordance with this opinion.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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NANNIE R. MACOMB, EXECUTRIX, ETC., v. JOHN F. PRENTIS.

Mortgages—Outstanding liens—Right of mortgagee to purchase—Agreement—Equity.

A mortgagor assigned to the mortgagee, as *additional* security for the payment of the mortgage debt, a mortgage in process of foreclosure, which was to be completed by the assignee, in whom the title to the mortgaged premises was to be perfected, and who was to hold said premises as additional security for said debt, and for the actual costs of such foreclosure and sale, and for any taxes or assessments levied or assessed upon the mortgaged premises *after* the assignment, all of which the assignor agreed to pay. It was further provided that in case of his failure to make such payment the assignee might purchase or pay the same, and be repaid therefor on the sale of said assigned mortgage or of the premises covered thereby. Provision was made for the re-assignment of the mortgage, or the conveyance to the assignor of the title secured on such foreclosure sale, on payment of the original mortgage debt, and any costs, taxes, or assessments which the assignee might have paid by virtue of the agreement; and it was expressly provided that the assignee should not be liable for any loss or damage caused by the sale of said premises for the non-payment of taxes or assessments. The assignee completed the foreclosure, and bid in the mortgaged premises, and for the purpose, as claimed, of protecting his mortgage interest purchased outstanding tax titles, *not* covered by the agreement, and paid taxes charged against the mortgaged premises at time of the assignment. The original mortgage debt was satisfied by the foreclosure of the original mortgage, and in a suit brought by the assignee to foreclose the agreement contained in said assignment for the foreclosure costs, and for taxes assessed *after* the making of said agreement, which he had paid, he also sought to recover the money paid for said outstanding tax titles and taxes; and it is held that before such a liability on the part of the assignor could exist, or a lien be created, a special agreement would have to be made, which contract a court of equity cannot create for the parties.

Appeal from Wayne. (Gartner, J.) Argued October 16, 1889. Decided December 28, 1889.

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Bill to foreclose lien on real estate. Complainant appeals. Affirmed. The facts are stated in the opinion.

William J. Gray, for complainant.

H. G. Holmes and *B. T. Prentis*, for defendant.

SHERWOOD, C. J. This suit was commenced by John N. Macomb, and a decree for partial relief made for complainant. Complainant appealed to this Court, and died before the same was argued here, and the cause, by order, has been duly revived by Macomb's executrix.

From the record it appears that on October 26, 1882, John N. Macomb obtained from John F. Prentis a bond, secured by a mortgage upon lands in Mackinac and Chippewa counties, for the sum of $14,000. This mortgage was foreclosed, and the property was sold under the decree, in October, 1885. Prior to this sale Macomb assigned his entire interest in this bond and mortgage and decree to the Sands & Maxwell Lumber Company, and was paid the full amount of the bond and decree, thus extinguishing Prentis' debt to Macomb.

The bond was further secured at the time of its execution by an assignment of another mortgage given by David M. Richardson to John F. Prentis on property in Detroit, described as lot 10, and the east half of lot 9, of the Baker farm, and which was then in process of foreclosure. Briefly, this agreement provided that the Richardson foreclosure should be carried to completion, and the title perfected, upon a sale, in Macomb, who should hold the mortgaged land as additional security for the bond; and then continues as follows:

"4. The said Prentis shall pay the actual costs of such foreclosure and the sale, and any and all taxes or assessments hereafter levied or assessed on said mortgaged premises; and in case said Prentis shall contract for the sale of said mortgage, or the premises derived from such

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foreclosure, the said Macomb, on receiving the net proceeds derived therefrom, shall assign said mortgage, or convey any title derived by him on said foreclosure, to whomsoever the said Prentis may direct, and the net proceeds shall be applied on said $14,000 mortgage; and, in case said Prentis shall neglect to pay such costs and taxes or assessments on said premises, the said Macomb may purchase or pay the same, and be repaid therefor on the sale of said mortgage or said mortgaged premises, with interest, and the remainder to be applied on said $14,000.

"5. The said Macomb agrees that he will hold said mortgage, or the title derived on the foreclosure, and on the payment of the said $14,000 mortgage, and any costs, taxes, and assessments that said Macomb may have paid by virtue of this agreement, that he will assign to said Prentis said mortgage, or convey to him any title derived by him on such foreclosure, freed and discharged from any liens or incumbrances caused by or through him, except that said Macomb shall not be liable for any loss or damage caused by the sale of said premises for the non-payment of taxes or assessments.

"6. It is agreed that in the foreclosure and sale under said mortgage the said Macomb shall bid the full amount decreed to be due thereon, unless the said Prentis shall direct the bidding of a less sum, and that no charges shall be made for the foreclosure of said mortgage, and that said Macomb shall be allowed for the cash disbursements made on such foreclosure and sale, and for taxes paid by virtue of this agreement."

The assignment was dated October 27, 1882, and this security was excepted from the operation of the assignment to the Sands & Maxwell Lumber Company. The foreclosure of the Richardson mortgage went to sale, and the land was bought in by Macomb, who holds the title, which in his hands is in the nature of a mortgage. The purpose of the bill in this case is to foreclose the agreement contained in said assignment, for the amount of the foreclosure costs and taxes, or the moneys complainant has paid on account of the same.

There seems to be but little dispute that, if the com-

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plainant is entitled to a decree for any of the amounts claimed, it should go for the taxable costs, and for the taxes paid by complainant which have been levied since the date of the agreement. These include the State and county taxes of 1882, and the city, State, and county taxes of 1883, 1884, 1885, 1886, and 1887, and the decree below gave complainant a lien for all these amounts. Complainant, however, insists that she is entitled to foreclose for a number of prior taxes, the title to which vested in her under these circumstances.

On October 27, 1882, when the agreement was executed, the Richardson lots were subject to absolute tax titles for the city taxes of 1877 to 1880, and for the State and county taxes of 1877, 1878, and 1879. There were also unpaid the city taxes of 1881 and 1882, and State and county taxes of 1881, which were then either payable or redeemable. In the protection of his mortgage interest, Macomb, in 1883, purchased the city tax title of 1882, and paid the State and county taxes of 1881. On April 24, 1884, all right of redemption had expired upon the other tax sales, and the title under them was outstanding in the estate of Robert P. Toms, to whose executrix Macomb paid $598.74, and obtained the tax titles covering the city taxes of 1877 to 1881, and the State and county taxes of 1877 to 1879, both inclusive. At this time default had been made in the $14,000 bond, and foreclosure of the Mackinac county mortgage had been commenced. The amount thus paid, $598.74, included the county tax of 1880, which was afterwards refunded to Macomb. Including this, the original taxes, with the interest charged by the State on unpaid taxes, amounted to over $550. So that Macomb paid less than $50 bonus to the tax title holders.

Complainant's counsel admits that these taxes for 1877 to 1880, levied upon the Richardson lots, and for which

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titles had accrued, and for the State and county taxes of 1877, 1878, and 1879, did not fall within the agreement which was dated October 27, 1882, and that at that date there was due and unpaid city taxes of 1881 and 1882, and the State and county taxes for 1881, which were redeemable or payable. For the expense of getting up these tax titles, and for the last named taxes paid by the complainant, complainant invokes the aid of the equitable principles of this Court, which permit a mortgagee to add to his original lien the expense he has been subjected to in securing outstanding liens to protect his mortgage against adverse and paramount claims. In 1882 the law permitted the lienholder to pay a returned tax, and collect the amount paid with his lien. This was certainly the case with all taxes returned after the act went into effect, and this right is claimed by complainant independently of the statute, and authorities are cited to sustain this position,[1] and it is further claimed that this view of the case is not contravened by the contract itself.

I do not think the taxes now claimed for in this suit could be required of Macomb under the agreement; neither were they paid by virtue of the agreement; and it will be discovered, by reading the fifth clause, that it was only for such that Macomb was to be allowed as precedent to conveying; neither was Macomb to be liable on account of said premises being sold for taxes. Before a liability on the part of Prentis could exist or a lien be created for the taxes previous to the date of the agreement, which had matured into a title in favor of Macomb, a special agreement for that purpose would

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Counsel cited *Sidenberg v. Ely*, 90 N. Y. 257; *Broquet v. Sterling*, 56 Iowa, 357; 2 Jones, Mort. § 1137; *Harper v. Ely*, 70 Ill. 581; *Davis v. Bean*, 114 Mass. 360; *Bank v. North*, 4 Johns. Ch. 370; *Comstock v. Michael*, 17 Neb. 288; *Eaton v. Tallmadge*, 22 Wis. 526.

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have to be made, and a court of equity cannot create such a contract for the parties, and the court was right in so holding.

Objection was taken at the trial, which was had in open court, to the testimony of Browse T. Prentis, because the facts testified to were equally within the knowledge of Toms, the assignor of Macomb of several of the tax claims which were not allowed by the circuit judge in his decree; but as it very clearly appears that the testimony objected to had no influence with the circuit judge in giving construction to the contract between the parties, and upon that the circuit court reached his conclusion in the case, no harm was done by receiving the testimony, whether correctly or not.

As to the question of costs on dismissing the bill as to B. T. Prentis, the defendants, nor either of them, did not appeal, and they are not in a situation to raise the question. The decree for aught that appears in the record, should be affirmed.

The other Justices concurred.

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WILLIS E. WELLS v. THE BOARD OF EDUCATION OF WEST BAY CITY.

Public buildings—Contractor's bond—Liability of public officers for materials and labor—Suretyship—Measure of damages where contractor fails to complete work and sues for balance due—Evidence—Charge to jury.

1. Officers who contract for the erection of public buildings, and fail to require security from the contractor for the payment of labor and material claims, as required by Act No. 94, Laws

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of 1883, are liable in damages, at the suit of laborers and material-men injured thereby. *Owen v. Hill*, 67 Mich. 43; *Plummer v. Kennedy*, 72 Id. 295.

2. The liability of officers to pay for labor and materials furnished for the erection of public buildings, by reason of their failure to require security from the contractor for such payment as provided by Act No. 94, Laws of 1883, is more in the nature of a suretyship than a tort, when the officers have acted in good faith, and they are not bound to wait until suit is brought against them before making such payment.

3. Where a contractor for the erection of a public building was not required to give security for the payment of labor and material claims,—both parties being ignorant of the law requiring it,—and on being thereafter requested to execute the required bond refused to do so, and made default in performance of the contract, which was completed at the expense of the other party, in a suit by the contractor for the balance claimed to be due under the contract, the defendant may deduct from said claim the amount paid for material furnished, and labor performed, for the plaintiff, and also the amount due from him for material and labor, and for the payment of which demands have been made upon the defendant's officers, who, by reason of their failure to require said bond, are personally liable for such claims.

4. Where, on the failure of a contractor to perform a building contract, the other party has a right to take possession of and complete the building, he is entitled to set off from the contract price all necessary and reasonable expenses incurred in its completion, and in a suit by the contractor he is entitled to an instruction to that effect to the jury.

5. Where a contractor had furnished certain material made especially for the building he had contracted to erect, which was unsuitable elsewhere, and the other party, on taking possession of and completing the building on the default of the contractor to complete it by the time specified in the contract, refused to receive such material, he is liable for its diminished value.

Error to Bay. (Cobb, J.) Argued October 16, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

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Curtis E. Pierce (*Shepard & Lyon*, of counsel), for appellant.

James Van Kleeck and *Hurdis M. Ready*, for plaintiff.

LONG, J. On October 18, 1886, the parties to this suit entered into a written contract which, omitting the formal parts, reads as follows:

"That the said party of the first part agrees to furnish all materials and labor necessary to finish completed the work required in the erection of two two-story brick additions to the brick school-house in the First ward of West Bay City, Michigan, in accordance with the drawings and specifications thereof drawn by D. P. Clark, and which said drawings and specifications are made a part of this agreement, as much as if written herein.

"It is furthermore agreed by the party of the first part that the work shall be commenced immediately, and pushed forward as rapidly as consistent with good, safe construction, and as the weather will allow; that the building shall be inclosed, and the plastering done, on or before January 1, 1887, and the entire work finished, ready for occupancy, on or before March 1, 1887, and, in case of failure to complete the work at that date, he shall pay all damages sustained by the party of the second part in consequence thereof, each and every day the work is delayed beyond the time specified through the fault of the party of the first part, to be retained out of any moneys that may be due and unpaid on this contract.

"It is mutually agreed that the work shall be under the supervision of the architect, who shall have the right to visit and inspect the work, and the power to reject any work or materials not in accordance with the drawings and specifications. And the architect shall also have the power, through the party of the second part, in case of failure of the party of the first part to rectify errors or complete the work within the contract date, to employ other parties to complete the work, at the expense of the party of the first part.

"It is furthermore mutually agreed that, if the party of the second part shall at any time desire any changes in the work, their wishes shall be conceded to and executed by the party of the first part, and the work

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executed in the manner desired, without in any way violating or vitiating this contract; and, in case said changes shall increase the cost of the work, they shall be allowed for, at a fair and reasonable valuation; and, in case the work is diminished thereby, a fair and reasonable deduction shall be made from the contract price agreed upon between the party of the second part and the party of the first part.

"It is further mutually agreed that the work shall be kept fully insured, to cover the interests of both parties as they shall appear, from the moment the roof is on until the work shall be completed and accepted, the insurance to be placed and the premiums to be paid by the party of the second part.

"In consideration of the prompt and faithful performance of the work, and terms of this agreement, the party of the second part hereby agrees to pay unto the party of the first part, or his legal representatives, the sum of three thousand nine hundred and seventy dollars ($3,970.00), in manner following: Payments to be made, as the work progresses, to the amount of seventy-five per cent. of the amount of the architect's estimate, which shall be made fortnightly, and include only such material and labor as are upon the building site and in the work at the time said estimate is made, until the completion of the work to the satisfaction of the architect, and thirty days thereafter, at which time the twenty-five per cent. retained, together with all moneys due on the contract, shall be paid unto the party of the first part: *Provided,* that the work is then in good condition, and there are no claims or liens, from any source whatever, against either party, and that the drawings and specifications have all been returned to the architect."

The work was commenced under the contract in October, when the architect, finding the foundation insufficient, directed the contractor to make it broader, and for which $170 additional was to be paid. The plaintiff claims that in performing this additional work he found it difficult to procure stone; and that the architect, on account of unfavorable weather, stopped and delayed him in his work, but that he prosecuted the work diligently, and that it was not delayed through any fault of his;

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and that he did not come within the provision of the contract which made him liable for delay, or that which authorized the architect to take possession and complete the job because it was not finished and completed within the time specified in the contract; that on March 9, 1887, the architect took possession of the work, and plaintiff was prevented from completing it. It is also claimed that when the architect took possession the work was nearly finished and that the costs of completion did not exceed $600. The work and material, it is claimed, that were put in the building up to that time by plaintiff amounted to $3,573.47, and the plaintiff had received $2,600. The suit was brought to recover the balance under the contract over and above the amount paid, and the costs of completion. Plaintiff had judgment for the sum of $675.

It appears that the plaintiff, in making the estimate of the amount he had expended upon the building before the architect took possession, included therein the sum of nearly $1,000 for work and material for which he had not paid. The defendant sought to show that of this indebtedness it had paid, after it took charge of the work, about $386.57, for brick, lime, hardware, and lumber, and that the balance of plaintiff's said indebtedness still remained unpaid; that the creditors of the plaintiff were looking to the officers of the defendant and the defendant for the payment of such demands; and that a suit was then pending in the circuit court of Bay county to recover from such officers the sum of $108 of such indebtedness. The court refused to receive evidence upon this subject, and held that the defendant could not gain any advantage by reason of such payments, or from the indebtedness of the plaintiff remaining unpaid.

The defendant also attempted to show the cost of completion of the work, and, in establishing the cost and

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expense, made proofs of the items of labor and material procured and paid for by it, among such items being one of $106, which defendant had paid for material to H. & H. S. Lewis. This was objected to, for the reason that it was not included in the bill of particulars of the defendant's set-offs. This was excluded by the court, and the defendant, though moving to amend its bill of particulars by inserting this item, was not permitted to do so.

It appears that, before the architect took possession of the work, the plaintiff had made a contract with Mr. Clark to furnish the material and put the slate on the roofs for $160. At the time the defendant took charge of the work a portion of the slate had been put on, and Clark had all the slate on the ground, for its completion. The plaintiff paid Clark nothing upon the contract; and the defendant, after it took charge, arranged with Clark to complete his contract, and, after its completion, paid him $160, the full contract price. Defendant sought to set this amount off, but the court held that for all the work done by Clark while plaintiff was in possession the defendant was liable to the plaintiff in this action, even though the defendant had paid Clark for the work.

The plaintiff also claimed on the trial that he had procured certain mouldings for the building, and that, owing to their design, he was unable to make other use of them, and sold them for the sum of $25, they having cost him $83.75. The defendant claimed that under the declaration the plaintiff was not entitled to include this item as a part of his damages. The court held otherwise, and admitted the evidence. Substantially, the foregoing are the claims of the parties.

The errors claimed by defendant are as follows:

"1. That the defendant's evidence should have been

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received, showing the amount paid by it upon the indebtedness contracted by plaintiff for material and labor upon the said building, and the defendant should, in said action, in arriving at plaintiff's damages, have been allowed the benefit of such payments.

"2. That the court should not have excluded the evidence of defendant, offered for the purpose of showing that a suit had been brought against the officers of the board of education to recover the sum of $108 of the indebtedness contracted by plaintiff, and that defendant's evidence should have been received, showing the indebtedness of plaintiff still remaining unpaid, and that those to whom it was owing were demanding payment from the defendant and its officers.

"3. That defendant's evidence showing that material was purchased by it from H. & H. S. Lewis, and used in the completion of said building, should have been received.

"4. The defendant was entitled to have plaintiff's claim of damages reduced by the full amount paid by it to Clark.

"5. The court should not have admitted testimony showing that plaintiff was damaged by reason of certain material, procured by him for use in said building, having been disposed of by him for a price less than its value, and erred in submitting this question to the jury as one of the elements of plaintiff's damage in the case.

"6. That the charge of the court left the jury without any proper instructions relative to the measure of plaintiff's damages, if the jury should find that the defendant's action in taking charge of the building was not wrongful."

Upon this question the court charged the jury:

"Even in that case, the defendant would have to pay Mr. Wells something, and, to ascertain how much they should pay him, you will have to allow Mr. Wells the value of what he has done. That you must ascertain from the testimony. Estimate it according to the contract price. For example, if he had done half of the labor, half of the contract price; or three-quarters, or nine-tenths, allow him three-quarters or nine-tenths of the contract price, as the fact may be, and add to that any material that he furnished and that was used,—everything that he did or furnished that the defendant has

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had the benefit of. Anything that he furnished, and they had the benefit of, of course, they should pay him for. From that amount deduct the sum that it would take to finish and complete the contract. That sum that you have found, that is the amount due him for what he had done and furnished. Of course, that would be money that was due him from the defendant, so far as it had not been paid already. Now, from that you will have to deduct the amount that it would take to finish the building in accordance with the contract; also, the damage that the defendant suffered from not having the building to use."

Defendant's counsel offered to show on the trial that at the time this contract was entered into the officers of the board of education were not aware of the provisions of Act No. 94, Laws of 1883, making it the duty of the board contracting on behalf of the school-district to require security by bond for the payment by the contractor, and all subcontractors, for all labor performed or materials furnished in the erection of such buildings; that subsequent to the making of the contract for the erection of the building, their attention being called to the provisions of this act, they called upon the plaintiff, and demanded that he give the required bond, which he refused. This the court excluded.

We will discuss the points made by defendant's counsel in the order in which they are presented. We may discuss the first two points together, as to whether the defendant could be allowed to deduct from plaintiff's claim the amount it paid to material-men for material furnished plaintiff, and also for material actually furnished plaintiff, and labor performed, and not yet paid for, claim being made by the material-men upon the officers of the board for such payment. By the provisions of the statute above referred to, the officers are made personally liable for such materials upon failure to take the requisite bond. The provisions of this statute were

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not known to the officers at the time of the execution of the contract; but, as soon as they became aware of its existence, they made demand upon plaintiff for its execution and delivery to the board, which the plaintiff refused.

It was held in *Owen v. Hill*, 67 Mich. 43 (34 N. W. Rep. 649), that upon a failure to take such bond the trustees were liable in damages, at the suit of a material-man injured thereby. This ruling was upon an equal division, as the Court was then constituted. At the October term of this Court, 1888, that question again came before this Court in *Plummer v. Kennedy*, 72 Mich. 295 (40 N. W. Rep. 433), and the doctrine in the case of *Owen v. Hill* was fully approved by a majority of the present Court. The rule is therefore settled in this State that the trustees are so liable to material-men and laborers for a failure of the board to take such bond; and it became the duty of the contractor to give the bond when required by the board. It was the purpose of this statute to give to laborers and material-men some security for the labor performed or materials furnished by requiring the bond, which is to be held by the board for the use of such parties, and the statute gives the parties interested a right of action upon the bond. The fact that the bond was not given was in the first instance as much the fault of the contractor as of the board. Neither knew that it was required. When the bond was finally demanded the contractor was in fault in not furnishing it. The officers are, under the decisions of this Court, personally liable to material-men and laborers; that is, the material-men and laborers, not having the bond for their protection, may look to the officers personally. Plaintiff, however, claimed that, notwithstanding this, and though the officers are compelled to pay for what he has contracted for and had, and used in the building, and for which he has

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never paid, yet he should recover the full price from the defendant.

Defendant offered to show that the plaintiff was wholly irresponsible, which the court excluded. By the terms of the contract, the plaintiff was to complete the building by March 1, 1887; and, failing in this, the architect was authorized to take possession, and complete it. March 9 the architect took possession, and the plaintiff's action is to recover what is justly his due by the terms of the contract. The action is an equitable one, plaintiff having failed to complete his contract; and it would be neither equity nor justice to allow him to recover from the board of education for an amount which he has never paid nor expended, and for which it is claimed he is wholly irresponsible, and at the same time compel the officers of that board to respond to the very parties, and to the same amount in which he is indebted, for labor and material. The liability of such officers, when acting in good faith, is more in the nature of a suretyship than a tort. Whatever the officers, as members of the board, under such circumstances, are bound to pay, or whatever the board, as such, has paid, for labor and materials which the plaintiff was legally bound to pay, he cannot recover in this action.

In *Smith v. Shelden*, 35 Mich. 48, it was said:

"Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case where notes are given or bonds taken."

The court was in error in refusing to allow the defendant to give evidence of the fact that its officers were

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not advised of the existence of this statute at the time of making the contract, and that they afterwards demanded the bond, which plaintiff refused to execute. The court should also have permitted the defendant to show the amount and character of the material furnished to plaintiff, and labor performed by him, by material-men and laborers, which remained unpaid, and which the officers of the defendant had paid, or for which they were legally liable. These officers are not bound to wait until suit is brought against them before making payment. Any payment made would be for the benefit of plaintiff, and this and any other sum deducted from the amount of his damages in this action, which he was legally liable for to material-men and laborers, and for which, under the circumstances, the officers of defendant were holden, would only be a matter of equity and justice. Even by the terms of the contract, it would seem that there were to be no claims or liens against either party at the time the work was to be fully paid for. It is evident that the parties themselves must have regarded this clause in the contract as one which called upon the contractor to pay for all labor and material before the 25 per cent. which was kept back upon estimate as the work progressed was to be paid.

The court should also have received the evidence offered to show the bill of material purchased from Lewis by the defendant. The plaintiff could only claim the contract price, less what had been paid him and what it cost to complete the building, and the other deductions spoken of. These materials were used in the completion of the building. The defendant also had the right to have deducted from plaintiff's claim what it paid Clark for the slating. We see no error in the ruling of the court under the fifth claim of defendant. If the defendant refused to receive the material, it having been made

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especially for that building, and unsuitable elsewhere, the plaintiff should be allowed the diminished value.

The court should also have presented the defendant's theory of the case to the jury, and directed them as to the measure of damages, if the defendant had the right to take possession of the building at the time it did, and complete it. Under any circumstances, the defendant was entitled to set off from the contract price all the necessary and reasonable expenses incurred in its completion.

For the errors pointed out the judgment of the court below must be reversed, with costs, and new trial ordered.

The other Justices concurred.

JOHN Q. ADAMS AND DWIGHT L. WEST, ADMINISTRATORS, ETC., v. THE IRON CLIFFS COMPANY.

Negligence—Directing verdict—Presumption against contributory negligence—Public highways—User—Estoppel—Fellow-servants.

1. Where in a negligence suit there is no eye-witness to the accident it will be presumed, in the absence of any evidence to the contrary, that the deceased used ordinary care and caution, which presumption is sufficient to permit the plaintiff to recover upon showing negligence on the part of the defendant. *McWilliams v. Mills Co.*, 31 Mich. 274; *Mynning v. Railroad Co.*, 59 Id. 257, 64 Id. 102, 67 Id. 680; *Kwiotkowski v. Railway Co.*, 70 Id. 549.
2. Where in a negligence case there is a chance upon the facts shown for ordinarily candid and intelligent men to arrive at different conclusions, the question of contributory negligence is to be determined by the jury.
3. Public user alone, when sufficiently general and long continued, will constitute an acceptance of a country road.

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4. Where a corporation has for over 20 years maintained a road across its property, which has been used by the public as a connecting link in a road between two towns, and has laid railroad tracks across said road upon its property, and permitted the public to use the crossing, which it has planked, without any dissent, it is estopped from denying that, so far as said crossing is concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and is bound to use due care and diligence in running its trains over said crossing to prevent injury to passengers lawfully on the road.

5. Where a servant, whose duty it is at any time during working hours when upon the master's premises to perform the duties incident to his employment, starts to leave the premises on his private business, and is injured by the alleged negligence of the master, while upon the premises, and during working hours, he is at the time in the employment of the master.

6. A founder in a blast furnace for the manufacture of pig-iron, who has a separate department,—the inside work of the furnace,—and who has nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, is held to be a fellow-servant of an engineer whose business it is to move the cars on the furnace track as desired in the business, and to assume the risk that said cars might be handled negligently by said engineer.

Error to Marquette. (Grant, J.) Argued October 17 and 18, 1889. Decided December 28, 1889.

Case. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Hayden & Young, for appellants.

W. P. Healy (*Arch. B. Eldredge,* of counsel), for defendant.

[The positions of counsel are stated and discussed, with citation of authorities, in the opinion.—REPORTER.]

MORSE, J. This action is brought for the death of James A. Root, on March 8, 1886, by the alleged

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negligence of defendant. The court directed a verdict for the defendant upon several grounds:

1. The declaration alleged that the accident occurred on a public highway, and that the deceased was therefore entitled to all the rights and privileges of a traveler on a public highway. The court found that there was no testimony tending to show that the road in question was a public highway of sufficient force to be submitted to the jury, and held that this was the private road of the defendant, and that the public had acquired no rights in it by user or otherwise.

2. The court found that the plaintiffs' intestate must have been guilty of contributory negligence.

3. That none of the allegations in the declaration of plaintiffs as to defendant's negligence had any foundation in fact, except the averment that the engineer was negligent in starting his train without warning, and that, as to this negligence of the engineer, such engineer was a fellow-servant of the deceased, and there being nothing in the case to show that defendant did not use due diligence in the employment of competent men, and no evidence that the engineer or brakeman was not competent, the plaintiffs could not recover for any negligence on the part of said engineer.

In order to fully understand the bearing and correctness of these rulings it will be necessary to state some of the surroundings and circumstances of the accident, or killing of Mr. Root, as shown upon the trial by the plaintiffs.

The defendant corporation owns and operates a blast furnace at Negaunee, on the line of the Chicago & Northwestern Railway. This furnace manufactures charcoal pig-iron. This requires room for cord-wood, charcoal, flux, and iron ore, as well as a yard in which to store the pig-iron. The furnace consists of two stacks, and a tract of land called the "furnace bank" is occupied in carrying on the business. This location is unfenced.

From the main line of the Northwestern Railway, there ran up to the furnace, at quite a steep grade, two

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parallel tracks, and these two tracks connected with other tracks that ran directly into the furnace. These tracks were built by the defendant, but belonged to the railway company, and were used by both the defendant and said company as occasion required, but principally by the defendant. Across these two parallel tracks, called "furnace tracks," there ran three different roads or wagon tracks, all of which connected with a single road or highway leading from the city of Negaunee to Palmer, a village built up in consequence of the Palmer mine and other mines near it. The lower road across the furnace track, and the one nearest the Northwestern Railway, was the road principally used in going from Negaunee to Palmer, or "Cascade," as that village was sometimes called, and was known as the "Cascade Road," and was the road used as a mail route between the two places.

Upon the morning of the day of Mr. Root's death, and about 10 o'clock, defendant's engineer, John Beck, with one brakeman, John Wannamaki, had started from the furnace bank with an engine, backing from five to seven empty box-cars slowly down the grade towards the main line of the Northwestern Railway. As these cars reached the crossing, the brakeman, who was on top of them, saw some cars loaded with pig-iron, which were standing on the other furnace track, get away from the control of the persons in charge of them, and start down the grade. He immediately set two brakes on what he called the front car, the one furtherest from the engine, of his train, and ran down to help stop the cars on the other track. The cars on the first track were stopped over the crossing nearest the railway, and called by the plaintiffs the "Cascade Road." He testifies that half of the forward car was over the crossing. The next crossing was also blocked by cars, but the upper crossing was open. This was seldom used, however. The testimony is not very definite

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as to how long these cars remained upon the crossing, the time being somewhere between 5 and 15 minutes.

It is not shown how Mr. Root got under the cars, as no one was present when it happened. The last seen of him was a few minutes before, when he was going along the lower road or highway towards the city of Negaunee. When the brakeman stopped his cars, and before going to the help of the others, he ran back, and told Beck, the engineer, to stop there until he got back. He then ran down to the runaway cars. He jumped on top of them, and set the brakes and stopped them. After they were stopped, he started to go back to his own cars. He did not signal the engineer to start. While going back he heard a yell, and saw the section-boss, Callaghan, running towards the brakeman's cars, which were moving down the grade. There was no bell on the engine of this train, but it was provided with a whistle, which plaintiffs claim was not blown before the starting. Mr. Root was found caught by his right hip under the brake beams of the rear wheels of the foremost car, as they were backing. He was lying on his back, with his face turned upward, and his head and body were outside the track. He was dragged in this way down the track, until his body struck the guard-rail of the frog. The train was then stopped, and Mr. Root taken out. He died almost instantly after being released. How deceased was caught, and when, cannot be definitely ascertained, as when first seen the cars were moving, with his body caught and held under the cars as above stated. There were some blood spots on the snow along-side the rail, beginning at a place a dozen feet or so from the traveled part of the road, over the crossing; and the marks of his body dragging from this point were seen down to the frog, about 300 feet from the crossing. Along the south side of this furnace track, and on the side where Mr. Root evidently attempted

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to cross, was a bank of snow about two feet high, and between this bank of snow and the cars there was not room enough for a man to walk. It was the theory of the plaintiffs upon the trial that Root, seeing the train remain so long, had undertaken to go around the car, probably supporting himself by placing his hands upon the side of the car while he walked on the bank of snow along-side, and the sudden starting of the cars had thrown him down and under the wheels.

The court charged the jury as follows:

"Now what evidence have you as to the manner of killing? We find the cars across the crossing. We find Mr. Root either under the rear car wheels of the first or the second car. The height of the cars above the track was somewhere from two to two and a half feet. The track was of the usual width, we assume,—in the neighborhood of four or five feet wide. The deceased would have to go some way down the track in order to get across. Now it is clear that there are three ways in which the deceased might have got under those cars. He might have attempted to have gone under there, under the assumption that the cars would stand there until he had time; he might have undertaken to have gone around, and the cars started, and he thrown down and thrown under; or he might have reached the end of the car, and been knocked down and run over when he reached the end. In either case, gentlemen, what was his duty? The plaintiffs claim that they would go to you, as I understand it, upon the theory that the deceased had gone around the car. Assume that to be the case, then you have heard the testimony in regard to the speed with which this train went down. I take it that in that case,—that train and engine attached standing upon the track,—it is notice to every one that that train may start at any time. It is in law, in my judgment, clearly contributory negligence for persons to go along by the side of that car, where, if it moves, they are in danger of being thrown under, or to go around the end of the car, and be so near that when the train started, as it did here, they may be knocked down and caught under the cars. I take it, gentlemen, it is the law, a man may not go so near a train of cars as that,

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going around, under circumstances of this case, and still have a jury say that they will infer that he was in the exercise of due care and caution. It seems to me clear that it cannot be the law. If he attempted to get underneath the cars, and go across, then that was clearly contributory negligence. So I must charge you, gentlemen, that the plaintiffs in this case have failed to show you evidence from which you would have the right to infer that the deceased was in the exercise of proper care and caution. It would not do to leave juries to guess; there must be evidence from which they may find the substantial facts to entitle a party to recover."

This brings up squarely the question of contributory negligence in a case where there is no eye-witness of the accident. In such a case, while the rule is not relaxed that the plaintiff must show that his intestate was without fault, yet the presumption, in the absence of any evidence to the contrary, obtains that the deceased used ordinary care and caution in attempting the crossing, and such presumption is sufficient under the rule to permit the plaintiff to recover upon showing negligence in the defendant. *McWilliams v. Mills Co.*, 31 Mich. 274; *Mynning v. Railroad Co.*, 59 Id. 257 (26 N. W. Rep. 514), 64 Id. 102 (31 N. W. Rep. 147), and 67 Id. 680 (35 N. W. Rep. 811); *Kwiotkowski v. Railway Co.*, 70 Id. 549 (38 N. W. Rep. 463); *Railway Co. v. Clark*, 108 Ill. 113; *Teipel v. Hilsendegen*, 44 Mich. 462 (7 N. W. Rep. 82).

The court was of the opinion that the deceased might or must have been caught in one of three ways, and that it would not do for the jury to guess as to the facts of the case. But one of these three ways by which the plaintiffs' intestate might have got under the cars, to wit, undertaking to go round the cars by walking on this bank of snow, and slipping therefrom under the cars, was, in the theory of the plaintiffs, the manner in which he did slip or fall under them, and the plaintiffs had the right, under the testimony, to go to the jury upon this

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theory, provided such an attempt to go round the cars was not contributory negligence on the part of the deceased. If there was, under the facts shown, a chance for different conclusions to be drawn by ordinarily candid and intelligent men, it was a question to be determined by the jury and not by the court. *Alexander v. Big Rapids*, 70 Mich. 226 (38 N. W. Rep. 228); *Crosby v. Railway Co.*, 58 Id. 463 (25 N. W. Rep. 463); *Teipel v. Hilsendegen*, 44 Id. 462; *Luke v. Mining Co.*, 71 Id. 364 (39 N. W. Rep. 11). And it seems plain from the testimony of plaintiffs' witnesses, which alone must be relied upon for the solution of this question, as the whole case was taken from the jury, that this was the way the accident happened. The deceased could not have been at the end of the car, and there knocked down and run over, as it was clear from all the testimony that no wheel had passed over him, as he was found caught under the brake-beams of one of the rear wheels. Nor is it at all probable that he was attempting to crawl under the cars. The position in which he was found would indicate to most minds that he had slipped and fell upon his back under the cars, and got caught in that position, and in the position in which he was first discovered, and remained until he was pulled out. Was it contributory negligence in the deceased, attempting to walk along the side of the cars upon the ridge or bank of snow? I think the question was one eminently proper to be submitted to a jury, and one which a court has no right to decide.

It appears from the testimony that Mr. Root was a man between the age of 59 and 60 years, and well acquainted with the location and its surroundings, and with the business of the defendant, and its method of conducting such business. He was founder in the blast furnace, and a skilled man in the business. He knew that the train of

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cars before him were managed by a brakeman and engineer, without the aid of any other persons. The cars were on a steep down grade, upon which they would not ordinarily, and could not with safety, be backed downward without the presence and work of the brakeman. Mr. Root had started to go down town with the evident intention of attending to some private business of his own. When last seen by Fuller there were at that time no cars upon this crossing of the main road, leading to the city of Negaunee. It is quite probable that Root saw these cars stopped upon the track before he reached it, and the brakeman leave them to go after the runaway cars. If such was the case, was it negligence for Root, as a prudent man, to undertake to walk around them, a distance of about a half a car or more, upon this snow-bank? Would an ordinarily prudent man have done so? I have my own opinion, which it is not necessary here to express, but I am satisfied from what has already transpired in the case that ordinarily intelligent, careful, unbiased men might differ in their answers to this question, and therefore it should have been submitted to the jury. It is claimed that between 200 and 300 feet away there was a clear crossing which Root should have taken, but the query again arises, what would an ordinarily prudent man have done under the circumstances, knowing that the cars were set with brakes and stopped, and the brakeman gone to look after the other cars,—would he have tried to go a few feet around the cars, or would he have gone 200 or more feet out of his way and back again, to find a clear crossing? This was for a jury to determine.

Unless the mere act of walking upon this snow-bank was negligence, because he was liable to slip thereon, if not careful, I do not think it could be considered negligence in Root's attempting to pass around the car that

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blocked the crossing. If there had been no snow-bank there, but level ground, no one would claim that the attempt to walk around the car was in itself negligence; and whether or not the walking on top of this bank of snow was negligence was, under the testimony of the condition of such snow-bank, a question for the jury. It cannot be considered that he was bound to know, as claimed by defendant's counsel, that this train, without any brakeman upon it, and without any warning, was liable to move at any moment. How often in cities, where a number of tracks cross the street, do men and women pass around the end of stationary trains, when perhaps if they should happen to trip, and fall across the track, and the train start suddenly, without previous warning, they might be caught under it. In such a case, if the railroad employés were negligent, would it be said, as a matter of law, that the contributory negligence of the person injured must preclude recovery? I think not, and that the facts and circumstances would properly be submitted to a jury for them to determine whether or not there was negligence in such an attempted crossing.

The next subject of inquiry is the negligence of the defendant, and in this connection it will be proper to notice the testimony on the part of the plaintiffs as to this road, the crossing of which was blocked by this car. The circuit judge was satisfied that there was no evidence to go to the jury to show it to be any other than a private road of defendant's, upon which it owed no duty to the public or to travelers. The declaration of plaintiffs avers it to be a "public traveled highway;" that Root was lawfully traveling upon such highway, and attempted, as he had a right to do, to cross the furnace track at the highway crossing;—

"That while he was so attempting to pass along said highway, across said track at said crossing, without fault

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on his part, said cars and locomotive, without the ringing of a bell or any other warning from said locomotive whatever, and in the absence therefrom of brakemen, and while apparently abandoned, and without any warning from any brakeman thereon, and in the absence of any flagman or watchman at said crossing, as aforesaid, and without any warning of any kind whatever to plaintiffs' intestate, suddenly started with said cars backwards across said crossing, the engine being at the rear of the train as it moved, and thereupon, by means of the neglect and misconduct of the defendant, as aforesaid, and without his fault, said James A. Root was thrown down and under said cars, run over, and pushed and dragged along, under said moving cars, a long distance, to wit, ten rods, and thereby so badly injured that he died within, to wit, two hours thereafter."

There was testimony on behalf of plaintiffs that this road had existed since 1863; that there is no other means of going, and no other roads, between Palmer and Negaunee. A creek called "Partridge Creek" is the south boundary line of the defendant's property. The highway crosses a bridge over this creek, which bridge was repaired at different times by the city of Negaunee. The village of Palmer in 1886 had 800 inhabitants. The mail between the two places has been carried over this road since 1872. The road did not run exactly where it does now, across the defendant's premises, until 1881. In that year these furnace tracks were laid down, and the company made two crossings,—the one where Root was killed, and one above. Since that time the travel has gone over the road where the accident took place, except in cases of heavy loads, when they use the next crossing above. One witness, Mr. Kirkpatrick, testified that there was another little narrow road running from Negaunee to Palmer, but it was a roundabout way and used only for women to drive to the city who were in fear of the locomotive scaring horses on the road across the furnace premises. It was shown by this witness, on cross-examina-

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tion by Mr. Healy, of counsel for defendant, that it was customary in the Upper Peninsula for the public to use the private roads of mining locations without asking the consent of the owners. It was not shown that the public authorities of Negaunee had ever done any work upon this road within the limits of defendant's location, but testimony was offered and introduced tending to show work upon the road by the city authorities up to the line of such location, but this was afterwards excluded by the court.

I think it was competent to show that this road across the company's premises was a connecting link between a public road from Palmer to Negaunee, and that the testimony offered was proper for that purpose. No road was ever legally laid out between Palmer and Negaunee, but the plaintiffs claimed it was a road by user. This road was used by the public before these furnace tracks were constructed, and when they were laid down the defendant made a substantial crossing for this road, planking it between the rails of its track. The furnace bank was there in 1863, when this road was first used from Palmer to Negaunee, and such road passed over defendant's premises until 1881. When these tracks were laid in that year, the defendant, for its own convenience, in making a crossing changed the line of the road somewhat, but this does not change the situation.

There was competent testimony offered to show that the public had accepted the dedication of this highway by working upon it between Palmer and Negaunee up to the line of defendant's property on each side, and had repaired and maintained a bridge, half of which stood on defendant's premises. There is no doubt but it was a public road by user of more than 20 years, except upon the defendant's premises, and that the road upon its property was used for the same length of time as a con-

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necting link between the two ends of this road by its full consent. It was not necessary that it should be laid out, or attempted to be laid out, by the highway authorities. It could become a public highway by user alone. *Bumpus v. Miller*, 4 Mich. 159; *Detroit v. Railroad Co.*, Id. 209; *Baker v. Johnston*, 21 Id. 319; *Wicks v. Ross*, 37 Id. 464; *Peninsula Iron, etc., Co. v. Crystal Falls*, 60 Id. 523 (27 N. W. Rep. 666); *Kruger v. Le Blanc*, 70 Id. 76 (37 N. W. Rep. 880).

This was a country road, and as such could be accepted by the public by user alone. It was not necessary to show that there had been a formal acceptance by the highway authorities. Public user alone, when sufficiently general and long continued, will constitute an acceptance. See *Detroit v. Railroad Co.*, 23 Mich. 209, citing *Green v. Canaan*, 29 Conn. 157; see, also, *Baker v. Johnston*, 21 Mich., at page 344, per CAMPBELL, C. J.

Under the circumstances as shown by the plaintiffs, they were entitled to go to the jury on the proposition that the defendant, by keeping up this connecting link, and permitting it to be used generally by the public for a period of over 20 years, had thereby dedicated its use as such a link to the public; and also, that at any event, as long as it permitted the public to use this crossing without any dissent, the defendant was estopped from denying that, as far as such crossing was concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and was bound to use due care and diligence in running its trains over this crossing to prevent injury to passengers lawfully on this road. *Barry v. Railroad Co.*, 92 N. Y. 289.

It is not a sound proposition, either in morals or the law, that the defendant, permitting the public to use a road across its premises for so many years, planking the crossings of its furnace tracks for the accommodation of

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such public use, and allowing such road to be connected at one end by a bridge, partly upon its property, with the public highway leading to Palmer, and at the other end with the public road to Negaunee, forming, by so doing, with these connections the only road for public travel between these two places, can yet be authorized to treat every one, except its own employés, as trespassers while using this crossing. But this is the logical outcome of the claim made by defendant's counsel in this case; and such counsel contend that if, at the moment Root was injured, he was not in the employ of the defendant, he was nothing more nor less than a trespasser.

If the view that I have taken of this crossing be correct, then the engineer was negligent if he started the cars without any warning. This engineer, who was sworn for the defendant, testified that the brakeman signaled him to back the cars, which the brakeman denies. He also testifies that he blew the whistle three times before he started to back down. The testimony of the plaintiffs tended to show that no whistle was blown. Whether it was blown or not was a question for the jury.

The circuit judge ruled that the engineer was a fellow-servant of the deceased. If so, then the direction of the verdict in favor of the defendant was right.

It is claimed by plaintiffs' counsel that Mr. Root was not in the employ of the company at the time he was injured. Conceding that the deceased had started to go down town to attend to some private business of his own, which he was in the habit of doing every day, or nearly every day, still, when this accident occurred, he must be considered to have been in the employ of the defendant. There was no stated time in which he was authorized by his employment to leave the service of the defendant and go down town, and attend to his own business. It would

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appear that his duties at the furnace were not so exacting but that he could go about his private business at times without detriment to the defendant, and there is no doubt but he was permitted to do so. But his employment by the defendant was such that he was not authorized to subordinate its business to his own, and at any time during working hours when he was on defendant's premises his duty was to look after and perform his duties there. His duties were multifarious, and if, at any time, after he had started to go down town, and while on defendant's premises, any need of his services had arisen, it would have been his duty, under his employment, to have at once stopped and given such services. He was not permitted at any time to say in his own mind, "I will now leave the employment of the company at once, and go about my own business," regardless of what might occur on the premises before he left them requiring his care and attention under his employment. He was not out of the employment of the defendant until he was off its premises. *Broderick v. Depot Co.*, 56 Mich. 261, 268 (22 N. W. Rep. 802). While he was at the furnace location, he had the care and management of a portion of defendant's property, which would call for his attention and oversight. See, also, *Ewald v. Railway Co.*, 70 Wis. 420 (36 N. W. Rep. 12). If this accident had occurred after Root's day's work was ended, the authorities cited by plaintiffs' counsel would apply; but they do not touch the case at bar. See *Baird v. Pettit*, 70 Penn. St. 477, 483, and Taylor, J. (dissenting opinion), in *Ewald v. Railway Co.*, 70 Wis. 433 (36 N. W. Rep. 593), and cases there cited.

The only remaining question is, did the circuit judge err in holding, as a matter of law, that Root was a fellow-servant of the engineer? The business of the engi-

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neer, by his own testimony, was to move the cars on the furnace track as desired in the business.

"*Q.* Who gave you orders? Who was in control of you?

"*A.* When I first took the position, sometimes Mr. Corbett and sometimes Mr. Root. If the master mechanic had anything to do,—wanted a car shoved, or machinery, —he would come and tell me what to do. After I got into the way of the business, I knew what to do, without there was any extra work to do. If there was anything extra to do, who wanted it done would come and ask me to do it."

Mr. Thompson was the master mechanic, and foreman generally over the machinery. Alexander Maitland was the general manager of the whole business. He testified on behalf of the defendant that Root, as founder, had charge of the furnace.

"Every man around working the furnace was subject to Root's orders. He had the right to order the master mechanic, from the fact that if the machinery was out of order, or any pipes broken, he had the right to authorize that man to repair those, or he couldn't run his furnace. He had the right to go to the blacksmith shop, and tell him to make what was necessary for him for the proper use of the furnace. He had the right to go to the carpenter, and do the same thing. He had the right to go to Mr. Corbett, who had charge of all the laborers, and tell him to do whatever was required to be done for the successful running of the furnace. In fact, as founder, he ought to have those rights, or he couldn't get along. I couldn't be there to direct, and some one must have authority around the furnace, and the founder is supposed to be the man that knows all about the operations,—what is wanted to be done to run the furnace, and to be successful. To curtail his authority would be to hamper him, and make the plant unprofitable. In regard to carrying out pig-iron, and where it should be piled, and who was to pile it, that was decidedly his business, because he was responsible for the proper grading of the iron, and proper piling of it; and I have always, in any matters regarding piling the iron, I always consulted and talked with Mr. Root about it. He didn't take direct

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charge of the handling of the locomotive, from the fact that it was not necessary at all times, unless he desired a change. These departments might be organized for the purpose of lightening his labors to a certain extent. He would not have to look after them actively all the time. He had the right to tell the engineer where to place his cars, and tell him to bring in what he wanted."

Mr. Corbett, a witness for defendant, testified that he controlled the men working *outside* of the furnace. He was bank boss. Thompson, the master mechanic, kept the engineer's time. The men that Corbett controlled loaded pig-iron, unloaded ore and stock charcoal in the shed. He directed the movement of cars at times.

On the part of the plaintiffs, Mr. West testified that he worked as assistant under Root for four years, and one year running an engine; that Root's duties as founder were the charge and control of the inside work of the furnace. He had nothing to do with the outside work, such as moving cars or engines about the furnace.

"It was outside of his business. If he wanted anything done,—anything of that kind,—he went to the man who had charge of the outside work, the banksman, Mr. Corbett."

Witness thinks the engineer was under the control of the master mechanic.

"Root had no control or direction, or right to direct the engineer or brakeman, in the discharge of their duties. Beyond the discharge of his particular duties, he came into no particular contact with these outside men."

Root had 15 men under him, that he hired himself, and outside of them he couldn't order any one to do anything. When he wanted anything, coal, ore, or work done, he could request it, and that was all. Under plaintiffs' testimony, Root had a separate department, the inside work of the furnace, and had nothing to do with the other departments, except he acted through the general manage-

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ment or the foreman or boss of such departments. He had no control beyond his own work, though all were engaged in the same common object, to wit, the manufacture of pig-iron. If this makes him a fellow-servant of the engineer, then the court below was correct in its ruling.

By an equal division of this Court in *Sell v. Lumber Co.*, 70 Mich. 479 (38 N. W. Rep. 451), it was held that the plaintiff, who worked in the saw-mill of the company, was a fellow-servant of the men in charge of the warehouse kept for the storage of salt. It appeared in that case that the saw-mill and salt-block were run in conjunction, but the business of one was really separate and distinct from the other. For that reason the Court divided. Here it was all one business, but divided into different departments.

The general doctrine as to fellow-servants is laid down in the text-books as follows:

"All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants." 2 Thomp. Neg. 1026; Cooley, Torts, 544, note; Wood, Mast. & Serv. § 435; Mechem, Ag. § 668.

Nor does it make any difference that the servant guilty of the negligence is a servant of superior authority, unless such superior servant arises to the grade of the *alter ego* of the principal. There are certain duties, however, which belong to the master, which cannot be delegated to an agent or servant, so as to relieve himself of responsibility; among other things, the duty of selecting competent servants, the providing of suitable machinery and appliances, and a safe place to work. The duty of providing a safe and efficient method of moving trains upon these furnace crossings would come under this head. The

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engine was not provided with a bell, but there was a whistle, which, if used, would be sufficient warning of its approach. The negligence, if any, consisted in the obstructing of the crossing, and the sudden starting of the cars without blowing the whistle. This was the negligence of the engineer, who was a servant of defendant, against whom no charge of incompetency is made. I am satisfied that the circuit judge, in his ruling that the engineer was a fellow-servant of Root, followed the settled law of this State. *Peterson v. Railroad Co.*, 67 Mich. 102, 109 (34 N. W. Rep. 260); *Mich. Cent. Railroad Co. v. Dolan*, 32 Id. 510; *Smith v. Potter*, 46 Id. 258 (9 N. W. Rep. 273); *Mich. Cent. Railroad Co. v. Austin*, 40 Id. 247; *Quincy Mining Co. v. Kitts*, 42 Id. 34 (3 N. W. Rep. 240); *Greenwald v. Railroad Co.*, 49 Id. 197 (13 N. W. Rep. 513); *Gardner v. Railroad Co.*, 58 Id. 584 (26 N. W. Rep. 301); *Davis v. Railroad Co.*, 20 Id. 105.

It is suggested as an independent proposition that the risk of injury at this crossing from the management of this train of cars was not one assumed by the deceased in his employment; that there was nothing in the nature of his employment to subject him to such a risk. This suggestion is not tenable. These cars were running hourly and daily in the business of defendant. Without such running from the main railway line to the furnace Mr. Root could not have operated the furnace over which he had control. He not only relied upon these cars, but called upon them to furnish coal, etc., for the uses of the furnace. He knew that they must pass over this crossing every few minutes, and he also knew that he must use the crossing more or less in his employment. He therefore assumed the risk that these cars might be handled negligently by his fellow-servants, the persons

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employed in running and managing them. The judgment must therefore be affirmed, with costs.

SHERWOOD, C. J., and LONG, J., concurred with MORSE, J.

CAMPBELL, J. I concur in the result, on the ground that there was no liability in the company on any ground that I can conceive.

CHAMPLIN, J., did not sit.

HATTIE C. OSGOOD ET AL. v. ISAAC OSGOOD AND MARY E. OSGOOD.

Estates of deceased persons—Lien for moneys advanced—Foreclosure—Equity.

In this case complainants,—the widow and minor children of defendants' deceased son,—are held entitled to a lien upon a certain store-building and lot, to secure the payment of $2,700 furnished by the son to his father towards erecting said building; and it is decreed that in default of the payment of said sum, and interest, in 18 months after the death of the defendants, the property may be advertised and sold to satisfy said lien, in the same manner as upon a foreclosure of a mortgage in chancery.

Appeal from Jackson. (Peck, J.) Argued October 16 and 17, 1889. Decided December 28, 1889.

Bill to secure lien on real estate for moneys advanced. Complainants appeal from decree dismissing bill. Reversed and decree granted as prayed. The facts are stated in the opinion.

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C. B. Grant (*L. S. Montague*, of counsel), for complainants.

Blair, Wilson & Blair, for defendants.

SHERWOOD, C. J. The bill in this case was filed to establish and secure what may be found due and owing to the complainants from the defendants on certain real estate in the city of Jackson owned by said defendants, on an accounting to be had between them and the estate of their son, Hiram C. Osgood, deceased. The bill was duly answered by the defendants, and proofs taken upon the issues made by the pleadings and proofs; and the cause was heard upon such pleadings and proofs before Judge Peck, who dismissed the complainants' bill with costs. Complainants appeal.

A careful review of the case, and arguments of counsel, as presented in their briefs, leads us to a different conclusion.

The defendants are husband and wife, and reside in the city of Jackson, and have for many years. They owned a lot in the city, upon which, in 1884 and 1885, they erected a store-building, costing about $6,000. They had one child only, and his name was Hiram C. Osgood. He resided at L'Anse, Michigan, and while on a visit to his parents, in Jackson, in 1886, was taken sick; and, becoming partially insane, he was taken to the asylum at Kalamazoo, and there died on December 3, 1886. The complainants are his wife and three minor children. His estate was administered upon in the probate court of Baraga county, where he lived, and was there settled. Attempts were made by the administrator to have the defendants recognize the claim made against them in this suit, but without any favorable result.

It appears by the bill that the deceased, Hiram, during his life-time, let his father have about $2,700, to aid

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him in building the store, and for which the father refuses to recognize any liability to Hiram's estate, and claims that his son, at the time of his decease, actually owed him. Isaac Osgood conveyed to his wife, Mary E., a life-estate in said store and lot on January 6, 1884, to take effect on his decease, and placed the same on record. The estate of Hiram being unable to get an accounting with the defendants, or either of them, complainants filed their bill in this cause, and prayed:

"1. That the interest of complainants in said real estate may be ascertained by this court, and the said defendants, Isaac Osgood and Mary E. Osgood, be compelled, by the proper decree of this court, to execute and deliver a sufficient warranty deed or deeds of the same.

"2. That, in case it shall be found that said complainants are not entitled to such interest in said real estate, said defendant Isaac Osgood may be compelled to come to an accounting with complainants for the amounts of money so received by him, with interest thereon.

"3. That the defendants deliver to the register of this court all letters and documents in their possession that formerly belonged to the said Hiram C. Osgood, deceased.

"4. That the defendants pay the costs of this suit.

"5. That said complainants have such further and such other relief as may seem meet and proper."

The testimony in the case convinces us that the deceased, when he let his father have the money to aid him in building the store, did not intend to give it to his father, but it was furnished by the son with the understanding that it was in some manner to be secured for him in the store and lot, or for his children, and that it was his intention, when he left his home at L'Anse, to visit his father at Jackson, to have a settlement with him, and conclude the matter, and he took all his papers with him relating to that business. The correspondence between the father and son all tends to show these facts. There is no question in our minds but that it was also the intention of Isaac Osgood to retain in the property

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a sufficient interest to maintain him and the other defendant for and during their natural lives, and that the son should have the remainder,—whatever there might be left after their deaths,—and that the son, in the mean time, should be kept secure for the advancements of money he made to his father.

The proofs do not show any set-off to the complainants' claim, proper for allowance. That filed is all outlawed, except two or three small items, for care bestowed during the son's last sickness, and for the excepted items alone it is not probable counsel for defendants would urge an allowance against the son's estate.

We all think there should be a reversal of the decree at the circuit, and a new decree entered in favor of complainants, giving to them a lien upon said store and lot, thereby securing to them the payment of the sum of $2,700, with annual interest thereon at the rate of 6 per cent., to commence at the date of the decree, and, if said sum and interest is not paid within 18 months after the decease of said defendants, said property may be advertised and sold to satisfy said lien, in the same manner as upon the foreclosure of a mortgage in chancery; and the said defendants must not commit, or suffer to be committed, any waste upon said property during their natural lives. Complainants will be allowed to recover their costs of this suit.

The other Justices concurred.

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CHARLES BELLANT v. JOHN C. BROWN.

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Pleading—Declaration—Joinder of counts.

1. A declaration containing four counts, namely:

   a—For obstructing a navigable river with saw-logs so that plaintiff could not make use of it in floating his logs and timber, and in not making use of any means for the removal of such obstructions;—

   b—For a like obstruction of the river at another time and place, so as to hinder and delay the plaintiff's drive unreasonably, by which he lost the sale of his logs at an agreed price, and was obliged to sell the same at a greatly reduced price;—

   c—For breaking plaintiff's booms and chains, and setting his logs adrift, thus subjecting him to large expense in securing them from loss and destruction;—

   d—For breaking said booms and chains at another time and place, by means of which plaintiff's logs went adrift and became mixed with other logs, putting him to large expense in getting them together again, and sorting them from among other logs,—

   Is not objectionable for a misjoinder of causes of action.

2. Giving a statutory right of action different in form from that at the common law for the same grievance, does not abrogate the right to proceed at common law, unless the new remedy is declared to be exclusive.

3. How. Stat. § 7759, removes all objection to the joinder of a count in trespass with one in case, in the same declaration, and should be liberally construed by the courts.

Error to Cheboygan. (Ramsdell, J.) Argued October 17, 1889. Decided December 28, 1889.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Oscar Adams (*George E. Frost,* of counsel), for appellant.

Watts S. Humphrey, for defendant.

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SHERWOOD, C. J. This action is trespass on the case for obstructing the Ocqueoc river, a navigable stream, with saw-logs, in advance of plaintiff's drive of logs, and for neglecting to use any means for the removal of the obstruction, whereby the plaintiff, as he alleges, was put to large expense in the removal of such obstruction, in order to run his own logs, and thereby sustained great damage. The plaintiff's grievance was set forth in four counts. In these the defendant claimed there was a misjoinder, and objected to any testimony being received thereunder; and the court, being of the opinion that the objection was well taken, sustained the same, and dismissed the plaintiff's case. The case is now before us on error.

The only question submitted for our consideration is the action of the court in dismissing the plaintiff's case.

The plaintiff claims that the first count is in case for obstructing the river so that he could not make use of it in floating his logs and timber, and in defendant's not making use of any means in the removal of such obstructions; that the second count is in case, for obstructing the river in the same way, at another time and place, with logs, so as to hinder and delay the plaintiff's drive unreasonably, by which he lost the sale of his logs at an agreed price, and was obliged to sell same at a greatly reduced price; that the cause of action in the third count is in case, for breaking the plaintiff's booms and chains holding his logs at a certain time, by means of which plaintiff's logs went adrift, thus subjecting plaintiff to large expense and trouble in gathering them in, and again securing them from loss and destruction; that the fourth count is in case, for breaking the plaintiff's booms and chains holding his logs at another time and place, by means of which the plaintiff's logs went adrift and became mixed with other logs, and plaintiff was put

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to large expense in getting his logs together again, and in sorting them out from among other logs, with which they had become mixed, and suffered great damage thereby. Such is the claim of the plaintiff as to the form of action for the several causes in the declaration, and he contends that it was his duty to join them in bringing his suit, as he has done.

Counsel for defendants insists that the first count is in *assumpsit*, to enforce a statutory right, and which could not be maintained at common law, and under our decisions cannot be joined with a common-law action; that the second count is in trespass on the case, and that *assumpsit* and case cannot be joined in this State, under our statutes and practice; that the third and fourth counts are both in trespass. The defendant claims a misjoinder as between the second count and the third and fourth counts, and further insists that trespass cannot be joined with case.

The circuit judge, in deciding the case, held that a complete statutory right of action is stated in the first count, and, to sustain this view, counsel for defendant points to How. Stat. § 2037. And the court, further proceeding, said:

"The next is a common-law right; the cause stated is the obstruction of the stream. The next is for trespass in cutting plaintiff's booms and letting his logs go drifting down the stream, and the fourth count is of the same nature, and all these counts cannot be joined."

This declaration does not present a case where several different causes of action are all joined in the same count, and which causes are inconsistent with each other, requiring different judgments, such as heretofore have fallen under the condemnation of this Court (*Friend v. Dunks*, 37 Mich. 25, 39 Id. 734); but there are four separate and distinct causes of action, contained in as many different

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counts, but all in the same declaration, all sounding in wrong, and each count setting out the particular facts and circumstances under which such cause of action arises, and upon which damages are claimed. I think each count is in case, and all were rightly joined.

Each one of these counts contains the statement of a cause of action at common law; and the fact that a statute has been passed giving a right of action in either, different in form from that at the common law, does not abrogate the right to proceed at common law for the same cause, without some special provision of statute to that effect, and we have not been referred to any such statute.

By express provision of our statute, trespass on the case may be brought in any case where trespass will lie. The statute reads as follows:

"Where, by the wrongful act of any person, an injury is produced either to the person, personal property, or rights of another, or to his servant, child, or wife, for which an action of trespass may by law be brought, an action of trespass on the case may be brought to recover damages for such injury, whether it was willful or accompanied by force or not, and whether such injury was a direct and immediate consequence from such wrongful act, or whether it was consequential and indirect." How. Stat. § 7759.

This statute removes all objection to the joinder of a count in trespass with one in case, in the same declaration. These should receive no technical construction. They were intended to obviate the technical rules of pleading which had grown up under the decisions of the courts, and to enable parties to bring as many claims as possible into one suit, and thereby avoid the expense and vexation of as much litigation as possible; and, with this object in view, the statute should be liberally construed in its application by the courts.

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The judgment should be reversed, and a new trial granted.

The other Justices concurred.

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BRACKETT G. CASTLE v. PALEMAN S. CASTLE.

Mortgages—Negotiability—Foreclosure by assignee—Payments made to mortgagee without notice of assignment—Tender.

1. Where a mortgagee at the time the mortgage was given owed certain open accounts which he subsequently requested the mortgagor to *pay*, and agreed to allow the amounts so paid on the mortgage, and the accounts were paid by the mortgagor, who took assignments of the same in his own name, which assigned accounts he tendered to the assignee of the mortgage, —who took it subject to all existing equities,—and offered to pay him any balance due for principal and interest on the mortgage, which was refused, the amount of the accounts should be applied as payment *pro tanto* on the mortgage, and although the tender did not comply with all of the requirements necessary to discharge the mortgage, yet as it showed a willingness on the part of the mortgagee to make such payment as would effect such discharge at any time when it would be received without suit, the mortgagor should not be subjected to the payment of costs in a foreclosure suit afterwards brought by the assignee in defiance of such payments and tender.
2. In such a case, the fact that the mortgagor is not personally liable for the debt is unimportant, he being the owner of the land, which he must lose or pay the decree, and the effect being the same as if he had given his note and secured it by mortgage.

Appeal from Newaygo. (Palmer, J.) Argued November 13, 1889. Decided December 28, 1889.

Bill to foreclose a mortgage. Defendant appeals. Decree

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modified and affirmed. The facts are stated in the opinion.

W. D. Fuller, for complainant.

Albert G. Day, for defendant, contended for the doctrine stated in the opinion.

SHERWOOD, C. J. The bill in this cause is filed to foreclose a mortgage made by defendant to Warren B. Castle, dated August 24, 1885, on part of a block in the village of Fremont, in the county of Newaygo, to secure the payment of $125 on or before two years from date, with interest at 7 per cent., payable annually; said mortgage being made to secure a part of the purchase money of said property. No personal obligation was given by the mortgagor, or other person, to secure the debt. The mortgage was duly recorded on August 28, 1885.

At the time the mortgage was given the mortgagee owed his lawyer and his doctor claims amounting to the sum of $84, and subsequently requested defendant to pay these debts, and told him, if he paid them, he would allow the amounts so paid upon the mortgage. Defendant, accordingly, on July 5, 1887, paid the doctor his account, and on July 11, paid the lawyer's account, and took an assignment to himself of each account.

In the month of February, 1887, Warren B. Castle, the mortgagee, for the consideration expressed in the assignment of one dollar, assigned said mortgage to the complainant, who did not put the assignment upon record; and neither the mortgagor nor either of the assignors of the accounts knew anything of the transfer of the mortgage to complainant, at the time the doctor's and lawyer's assignments were made. When the mortgage became due, and payment was demanded by the complainant, defendant offered the two accounts, and anything beyond

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whether of the principal or interest, due upon the mortgage, in money, in payment to the complainant, which he refused, and filed the bill in this case on October 14, 1887.

The only question in the case is, should the defendant, under the circumstances above stated, be allowed his accounts purchased of the lawyer and doctor towards payment of the mortgage? The learned circuit judge held not, and gave a decree accordingly.[1]

I think this was error. The amounts of the accounts should have been applied as payment *pro tanto* upon the mortgage. The party to whom the promise to allow the accounts was made was the mortgagor, and he still owned the land. It is true, a personal judgment could not be rendered against him, but he was obliged to pay a decree under the foreclosure of the mortgage, or lose his land. The effect is the same as if he had given his note, and secured it by the mortgage. But the technical rules

[1] In explanation of the decision of the circuit judge, the following additional facts are stated:

1. The foreclosure bill was in the usual form.

2. The defendant in his answer claimed the right to *set off* against the mortgage debt two accounts,—one for $72, and one for $12,—which he claimed to have *purchased* of the owners.

3. The amount due on these accounts was admitted, subject to the right to object to their allowance as *legal offsets* in the case.

4. On taking the testimony, *under this issue*, in open court, the defendant produced the assigned accounts and stipulation, which were received under the objection stated. The defendant then testified, subject to objection, to a conversation with the mortgagee in which he told defendant that if he would *pay* these accounts, if there was enough, and, if not, get receipts for what there was, he would allow it on the mortgage. He further testified that he purchased the $72 account for $50.

5. The complainant introduced no testimony in regard to this alleged special agreement.

6. The circuit judge held that the accounts could not be allowed as *legal set-offs*, and in referring to the alleged special agreement said: "An examination of the pleadings will disclose that no such agreement is averred. Both the answer and the bill of particulars are silent and do not allude to such an agreement, and inasmuch as the proof when offered was objected to, and received subject to objection, and there is nothing in the pleadings upon which to base it, it cannot be considered, and without such agreement the claim of set-off cannot be allowed."

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which have grown up under the doctrine I do not think apply in the case. It is not a question of set-off, but payment, that the record raises. When the mortgagor obtained the doctor's and lawyer's claims under the agreement made between the mortgagor and mortgagee, it was a payment, and should have been allowed and indorsed as such upon the mortgage. The indorsement was not essential to give it the effect, however, of payment.

This mortgage is not negotiable paper. The present holder took it subject to all the equities against it, as they existed at the time the mortgagor obtained notice of the assignment thereof to the complainant.

The tender did not comply with all the requirements necessary to discharge the mortgage; but, inasmuch as it does show a willingness on the part of defendant to make such payment as would discharge the mortgage at any time when it would be received without suit, I do not think he should be subjected to the payment of any costs.

The decree will therefore be modified as herein suggested, and, as thus modified, re-entered; and the defendant must be allowed to recover his costs in both courts, which will be allowed to him as so much payment upon the mortgage, or upon any decree made upon foreclosure of the same, or so much of said costs as may be necessary to satisfy such mortgage or decree.

The other Justices concurred.[1]

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[1] An application for a rehearing was denied in this case. The following propositions were submitted in support of the application:

"1. The question of the *making* of the alleged agreement, without which defendant has no standing in court, has never been put in issue, nor tried, nor passed upon in the lower court, and complainant should not be concluded thereby, and lose his mortgage, and have a balance of costs left to pay, without an opportunity to contest *that* question.

"2. The allowance of the full amount of the accounts is, in any event, inequitable. He surely cannot claim more than he paid.

"3. If this be so, the complainant should recover costs below, as the defendant never offered to pay the balance due on the mortgage less the $62 paid by him, but demanded that he be allowed $84, the *face* of the accounts."

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HENRY GAMBLE v. WILLIAM C. STEVENS, AUDITOR GENERAL, AND SANFORD BRADSHAW, COUNTY TREASURER, ETC.

Taxes—Limitations on boards of supervisors and township boards in levying—Sale of lands for taxes illegal in part.

1. A tax of $1,000 voted by the board of supervisors to be included in the county tax, to be distributed among and expended by the several supervisors for highway purposes, is illegal. *Sage v. Auditor General*, 72 Mich. 638.
2. Where a bill is filed to restrain the sale of land for alleged illegal taxes, and it is conceded that $1,000 of the county tax is illegal, the circuit judge may deduct said illegal tax in making his decree, and allow the remainder of the tax to stand against the land.
3. Where no action appears to have been taken at the township meeting or by the town board, and none is properly certified to the supervisor by the township clerk, authorizing the assessment of a highway tax, such tax is illegal.
4. It is only on failure of the electors to vote taxes for township purposes at the annual meeting that the town board may vote the necessary sums for township expenses, and, as a condition precedent to such vote, such failure of the electors should be made to appear in some way to the township board, and the fact of such non-action should be evidenced by their record.

Appeal from Ogemaw. (Simpson, J.) Argued October 18, 1889. Decided December 28, 1889.

Bill to restrain the sale of lands for taxes. Complainant appeals. Decree modified and affirmed. The facts are stated in the opinion.

Tarsney & Weadock, for complainant.

Devere Hall (*D. P. Markey*, of counsel), for defendants.

SHERWOOD, C. J. The bill in this case is filed to

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restrain the sale of certain lands owned by complainant, described in the bill, situate in the county of Ogemaw, for taxes assessed against them in 1883 and 1884. It is not claimed that the State and school taxes for either of those years are invalid; but it is insisted by counsel for complainant that the highway, township, and county taxes for both of said years are void, and therefore the relief prayed should be granted as to these, and that the decree at the circuit, which was in favor of the validity of the entire tax for each of said years, except one-thirteenth of the county tax for 1883, and one-eighth for 1884, be modified by deducting all the highway, town, and county taxes for both of said years.

The board of supervisors of Ogemaw county, in each of the years of 1883 and 1884, voted to raise $1,000 for highway purposes, to be distributed among and expended by the supervisors of the several townships. This is conceded to be illegal by counsel for defendants; and the circuit judge deducted the amount, as illegal, in making his decree. When this can be done, as in this case it was done, I can see no objection to it; and the complainant is certainly relieved from the payment of the illegal tax, and his property freed from the lien thereof.

We think the decree is not objectionable on account of the county tax; but, in the case of the highway tax, no action is shown to have been taken by any one, either at the township meeting or by the town board, and none was properly certified to the supervisor by the township clerk. The assessment of highway taxes was unauthorized and illegal.

In regard to the township taxes, none appear to have been voted at the township meeting in either of said years. It is only on failure to do this that the town board may vote the necessary sums for township expenses. Before the town board can act in such cases,

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it should be made to appear in some way, and the fact should be evidenced by their record, that the township, at its annual meeting, neglected to vote to raise money for town expenses; and we do not find any proceedings had on the part of the township board in the record which would authorize the assessments made against complainant's property for such purpose, and such assessments are therefore void.[1]

The decree at the circuit court must be modified, for these reasons, and the taxes for township purposes and those for highways must be altogether omitted; and the decree for the collection of the balance will be affirmed, with costs in this Court to complainant.

MORSE, CAMPBELL, and LONG, JJ., concurred. CHAMPLIN, J., did not sit.

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J. A. FAY & CO. (A CORPORATION) v. JAMES JENKS & CO. (A CORPORATION).

[See *post*, —.]

Corporations—Contract—Breach—Assignment for benefit of creditors—Allowing claims—Effect of prior proceedings to collect.

1. Where, after a general assignment for the benefit of its creditors by a Michigan corporation, a non-resident creditor, with knowledge of such assignment, attaches property of the debtor in another state, and afterwards files its claim for allowance under the assignment, the value of said attached property should be ascertained and applied in reduction of the claimant's demand.

[1] The record showed that all of the members of the township board were present, and that "it was moved and supported and carried that $400 be spread on said roll for township purposes."

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2. A corporation made a general assignment for the benefit of its creditors. Its indebtedness to its principal creditor was evidenced by its notes, one of which was indorsed by its stockholders. After the assignment, suit was brought upon this note against the maker and indorsers, and the defendants appeared and under their plea of the general issue claimed to recoup damages growing out of the failure of the plaintiff to furnish to the corporation defendant goods to be sold on commission, as provided in a contract between said parties. The creditor (a corporation) also filed its *entire* claim for allowance under the assignment, and before a hearing discontinued the suit on the note, as to the corporation defendant, and proceeded to judgment against the indorsers. When the claim came on for hearing under the assignment, objection was made to proof of the note, and it was claimed that the amount of the judgment should be deducted from the amount of the claim as presented. And it is held that the controversy over the effect of such discontinuance and judgment could not affect the allowance of said claim, and can only be satisfied in the suit on the note.

Error to Wayne. (Brevoort, J.) Argued November 13, 1889. Decided December 28, 1889.

Claim against estate of insolvent. Assignee brings error. Reversed. The facts are stated in the opinion.

Bowen, Douglas & Whiting and *George W. Radford,* for appellant, contended:

1. The signatures of the corporation and of the indorsers to the $12,000 note were all affixed at the same sitting, and before the delivery of the note to the payee, and all of the signers must be held to be joint makers, and the discontinuance as to the corporation and proceeding to judgment against the indorsers operated in law as a merger of the note, which cannot be considered in this proceeding, and plaintiff's claim should be reduced by the amount of said judgment; citing *Candee v. Clark,* 2 Mich. 255; *Bonesteel v. Todd,* 9 Id. 371; *Winslow v. Herrick,* Id. 380; *Yawkey v. Richardson,* Id. 529; *Ballou v. Hill,* 23 Id. 60; *Evers v. Sager,* 28 Id. 47; *Anderson v. Robinson,* 38 Id. 407; *Munn v. Haynes,* 46 Id. 140; *Cross v. Eaton,* 48 Id. 184; *Post v. Shafer,* 63 Id. 85.

2. The plaintiff had no right to discontinue as against James Jenks & Co. after the plea of set-off, and notice of recoupment; citing Act No. 123, Laws of 1885.

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Moore & Canfield and *William H. Wells*, for complainant, contended:

1. The doctrine of merger to which defendant appeals is applicable where one holding a joint demand prosecutes to judgment an action against less than all. The debt against all is merged in the judgment against a part. But where one institutes a proceeding on a joint debt, against all who are jointly indebted, and discontinues as to a part, the discontinuance operates as to the *entire* action; citing *Anderson v. Robinson*, 38 Mich. 407.
2. The question cannot be raised under the pleadings. The action is in form one at common law, and the plea is the general issue with notice of recoupment. The assignment was made November 19, 1887, and the proof of debt was filed in due course thereafter. The action at law was commenced November 3, 1888. If the pendency of the action at law was relied on it should have been pleaded in abatement. If there had been a former recovery, which in fact there was not, it should have been pleaded in bar; citing *Briggs v. Milburn*, 40 Mich. 512.

LONG, J. On November 19, 1887, the defendant, a corporation under the laws of this State, and doing business in the city of Detroit, made a general assignment for the benefit of its creditors to Samuel T. Douglas. The indebtedness of the corporation at the time amounted to $32,288.30, and the claimant in this case is the principal creditor; its claim, as filed with the clerk of Wayne county, amounting on November 19, 1887, to the sum of $25,854.32. At the request of certain of the creditors, the assignee contests this claim. The case came on for trial in the Wayne circuit court before a jury, who, under the direction of the court, rendered a verdict in favor of the claimant of $28,591.08, being the amount claimed and interest. Appeal is taken by the assignee.

The stockholders of James Jenks & Co., at the time of the assignment, were James Jenks, holding 598 shares; Frederic W. Swift, holding 600 shares; George A. Jenks, holding 198 shares; and Henry C. Hart, holding four shares. James Jenks & Co. had, as a corporation, been

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engaged in business in Detroit for a number of years, selling wood-working machinery and manufacturing brass goods, but for several years the company was mainly engaged in selling machinery of J. A. Fay & Co. On April 1, 1884, Frederic W. Swift became a stockholder in the company, and put into the business $15,000. At that time the company was indebted to J. A. Fay & Co. in the sum of $13,000 or $14,000, and the amount of the capital stock was nominally $40,000. Col. Swift was made its treasurer, and continued to hold that position in the company up to about March 1, 1886, when he resigned his position. At this time the indebtedness to J. A. Fay & Co. had increased, and then amounted to about $22,000.

Some time just prior to October 19, 1886, Mr. Doane, president of J. A. Fay & Co., a corporation, and Mr. Lyon, its secretary, visited Detroit, and investigated the condition of affairs of James Jenks & Co.; and on October 19, 1886, the following agreement was entered into in writing between the two corporations:

"This agreement made this 19th day of October, A. D. 1886, by and between J. A. Fay & Co., a corporation organized and doing business under the laws of the state of Ohio, at the city of Cincinnati, in said state, party of the first part, and James Jenks & Co., a corporation doing business under the laws of the State of Michigan, at Detroit, Michigan, party of the second part, witnesseth.

"That whereas, the said corporation James Jenks & Co. is now indebted to J. A. Fay & Co. in the sum of $23,086.21, represented by the notes of said James Jenks & Co., as follows:

Note dated July 10, 1886, due Nov. 13, 1886.....	$ 1,686 48
Note dated Aug. 10, 1886, due Dec. 13, 1886.....	3,344 51
Note dated Sep. 10, 1886, due Jan. 13, 1887.....	3,238 68
Note dated Oct. 19, 1886, due Feb. 22, 1887.....	2,816 54

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Note dated Oct. 19, 1886, due on or before two years from date, interest 6 per cent., with privilege of making payments at any time, indorsed by James Jenks, George A. Jenks, and Frederic W. Swift	12,000 00
Total	$23,086 21

"It is therefore hereby agreed by and between the parties hereto, that said J. A. Fay & Co. hereby appoint said James Jenks & Co. sole agent for the exclusive sale of said J. A. Fay & Co.'s machinery in the State of Michigan, and that said J. A. Fay & Co. shall supply, on consignment, machinery to said James Jenks & Co., as the latter may require the same for sale in its business, which said machinery shall be properly insured by said James Jenks & Co. for the benefit of said J. A. Fay & Co. Said James Jenks & Co. is to report on the tenth of each month the sales for the previous month, and give its notes, due in four months, bearing date with said report, for the amount of such monthly sales, without interest; and in case said James Jenks & Co. shall at any time desire a renewal of any of said notes, or of the four notes first mentioned herein, said James Jenks & Co. may renew the same for the period of four months, with six per cent. interest, by giving thereon the indorsements of said James Jenks, George A. Jenks, and Frederic W. Swift, who are the stockholders of said James Jenks & Co. A second renewal of any note shall only be allowed by special arrangement with said Fay & Co.; and it is further agreed that, in case of failure to pay any renewed note at maturity, said J. A. Fay & Co. shall have the option to declare all indebtedness of said James Jenks & Co. to it due and payable forthwith, including said note for $12,000.00, and also to declare said agency at an end.

"In witness whereof the said parties hereto have affixed the official signatures the day and year first above written.

"J. A. Fay & Co.,
"By W. H. Doane, President.
"James Jenks & Co.,
"By James Jenks, President."

At the time of the execution of this contract the following note was executed:

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"$12,000.00. DETROIT, Oct. 19, 1886.

"On or before two years after date, James Jenks & Co., incorporated, promises to pay to J. A. Fay & Co. or order, twelve thousand dollars, at its office in Cincinnati, Ohio; said maker having the privilege of paying any sum at any time hereon, value received, with 6 per cent. interest per annum.

"JAMES JENKS & Co., Incorporated.
"By JAMES JENKS, President."

Indorsed on back:

"JAMES JENKS.
"GEO. A. JENKS.
"F. W. SWIFT.
"Pay cashier Citizens' National Bank, Cincinnati, Ohio, or order. For collection.
"J. A. FAY & Co.
"Note duly protested Oct. 22, 1888."

It appears that this $12,000 note, as well as the others, was given to secure the past indebtedness of James Jenks & Co., and Colonel Swift claims that he would not have indorsed this note except for the contract above set forth.

Just before the assignment was made, on November 19, 1887, by James Jenks & Co., Doane and Lyon again came to Detroit, looked over the affairs of the company, and demanded that Swift and James and George Jenks indorse the renewal notes. This Colonel Swift refused to do, when they were informed by Doane and Lyon that J. A. Fay & Co. would furnish no more machinery, and would take from their possession the commission goods then on hand. To this arrangement Colonel Swift protested. Immediately following this refusal to indorse these renewal notes the commission goods were removed, and within a few days the assignment was made. It is claimed that Doane and Lyon were fully advised of the assignment, and upon this claim there is but little, if any, dispute.

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After this assignment J. A. Fay & Co. caused attachments to be issued in New York and Chicago, and some of the property of James Jenks & Co. there situate was taken under the writs. It also appears that after the assignment J. A. Fay & Co. commenced suit in the Wayne circuit court upon the $12,000 note against James Jenks & Co. and the indorsers, Frederic W. Swift, James Jenks, and George A. Jenks, to which action defendants appeared, and, under their plea of the general issue, claimed to recoup damages by reason of a breach of the contract above set forth, in the plaintiff's therein failing and refusing to furnish the goods and machinery to be sold on commission as provided in the contract. Before the present claim came on for hearing, the plaintiff in the suit on the note discontinued as to James Jenks & Co., and proceeded to trial against the indorsers, and obtained judgment therein to the full amount of the note and interest.

The defense to the present claim is—

1. That there was a violation of the contract above set forth by J. A. Fay & Co.
2. That judgment having been taken against the indorsers on the $12,000 note, that amount should have been deducted from the amount of the claim presented here.
3. That the value of the property attached in New York and Chicago should have been ascertained in this proceeding, and deducted from the claim

From an examination of the contract, we do not think the defendant here is in a position to set up some of the breaches, as claimed. The contract provides that—

"Said James Jenks & Co. is to report on the tenth of each month the sales for the previous month, and give its notes, due in four months, bearing date with said report, for the amount of such monthly sales, without interest; and, in case said James Jenks & Co. shall at any time desire a renewal of any of said notes, or of the

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four notes first mentioned herein, said James Jenks & Co. may renew the same for the period of four months, with six per cent. interest, by giving thereon the indorsements of said James Jenks, George A. Jenks, and Frederic W. Swift, who are the stockholders of said James Jenks & Co. A second renewal of any note shall only be allowed by special arrangement with Fay & Co.; and it is further agreed that, in case of failure to pay any renewed note at maturity, said J. A. Fay & Co. shall have the option to declare all indebtedness of said James Jenks & Co. to it due and payable forthwith, including said note for $12,000, and also to declare said agency at an end."

When the stockholders, therefore, declined to indorse the renewal notes, the claimant, by the terms of this contract, had the right to declare it at an end, and its refusal to furnish the commission goods, and its action in removing the commission goods then on hand, was justified by the plain terms of the contract.

Another claim is, however, made by the defendant, which has some force, and which raises issues that should have gone to the jury. The defendant was to be the sole agent of Fay & Co. in Michigan for the exclusive sale of its goods, which were to be furnished and supplied when required by defendant. Some evidence was given on the hearing that Fay & Co. permitted sales to be made by other of its agents residing without the State within this territory. This is denied by claimant, but that question we can not settle upon this record. Some testimony was given tending in a measure to show it, and which must be taken here as true, the court having directed the verdict in favor of claimant.

The questions raised under the second claim need but passing notice. There is no dispute but that this note was given for an indebtedness of James Jenks & Co. existing at and before the time of the execution of the contract. It has never been paid, and whether there was a breach of the contract or not could not affect this note

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in the manner claimed. If the defendant sustained damages by reason of sales being made by other agents within its territory, these damages would go to the reduction of the damages of claimant as a whole, and would not specifically affect the note. The fact, also, that a discontinuance was entered as to James Jenks & Co. after issue in the suit brought on the note, and judgment taken against the indorsers, could not affect the questions here. Such controversies can only be settled in the suit on the note, and not here. If the judgment which is or may be obtained on the note is paid, it would of course reduce the claimant's demand here.

We think the court was in error in not submitting to the jury also the question of the value of the goods taken in attachment in New York and Chicago. It is evident that the claimant, through its officers Doane and Lyon, had full knowledge of the assignment of defendant; and, whatever the value of the property taken under the attachment, it should have been applied in reduction of the claimant's demand.

The verdict and judgment must be set aside, with costs, and new trial ordered.

The other Justices concurred

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J. A. Fay & Co. (a corporation) v. James Jenks & Co. (a corporation) et al.

[See *ante*,—.]

Promissory notes—Indorsers—Joint obligors—Discontinuance.

1. Where a note is indorsed prior to its delivery, and the indorsers are not the payees, the contract is in form joint against the

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makers and indorsers. *Weatherwax v. Paine*, 2 Mich. 555; *Rothschild v. Grix*, 31 Id. 150; *Herbage v. McEntee*, 40 Id. 337; *Sibley v. Bank*, 41 Id. 196; *Moynahan v. Hanaford*, 42 Id. 329.

2. When an obligation is joint as well as several, all must be proceeded against jointly, or each severally, subject to certain exceptions, as where one is an infant, or has been discharged in bankruptcy.

3. Where a suit is brought against the maker and the indorsers of a promissory note, which indorsements were made prior to the delivery of the note, a discontinuance as to the maker operates as a discontinuance against all of the defendants. *Winslow v. Herrick*, 9 Mich. 380; *Anderson v. Robinson*, 38 Id. 407; *Munn v. Haynes*, 46 Id. 140; *Post v. Shafer*, 63 Id. 85.

Error to Wayne. (Brevoort, J.) Argued November 13, 1889. Decided December 28, 1889.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Bowen, Douglas & Whiting, for appellants Jenks.

George W. Radford, for appellant Swift.

Moore & Canfield and *William H. Wells*, for plaintiff.

CHAMPLIN, J. The plaintiff commenced suit against the above-named defendants and the James Jenks & Co. corporation, and declared against them jointly upon the common counts in *assumpsit*, serving with the declaration a notice that on the trial they would give in evidence under the money counts one certain promissory note, a copy of which is as follows, namely:

"$12,000.00. DETROIT, October 19, 1886.

"On or before two years after date James Jenks & Co., incorporated, promise to pay J. A. Fay & Co. twelve thousand dollars, at its office in Cincinnati, Ohio; said maker having the privilege of paying any sum at any

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time thereon, value received, with 6 per cent. interest per annum.

"Due on or before Oct. 19-22-88.

"JAMES JENKS & Co., Incorporated.

"By JAMES JENKS, Prest."

Indorsements:

"JAMES JENKS.

"GEORGE A. JENKS.

"F. W. SWIFT.

"Pay cashier Citizens' National Bank, Cincinnati, Ohio, or order. For collection. J. A. FAY & Co."

At the trial the plaintiff discontinued the suit voluntarily against James Jenks & Co., incorporated, and filed an amended declaration against James Jenks, George A. Jenks, and Frederic W. Swift jointly. At the conclusion of the trial the court directed a verdict for the plaintiff.

The court erred. It is unnecessary to determine now whether the contract is several as well as joint. As held in this State, the contract is in form joint against the maker and indorsers, where the indorsers are not the payees, and the note was indorsed before the instrument was delivered, as was the case here. *Weatherwax v. Paine,* 2 Mich. 555; *Rothschild v. Grix,* 31 Id. 150; *Herbage v. McEntee,* 40 Id. 337; *Sibley v. Bank,* 41 Id. 196 (1 N. W. Rep. 930); *Moynahan v. Hanaford,* 42 Id. 329 (3 N. W. Rep. 944). The rule is elementary that, when an obligation is joint as well as several, all must be proceeded against jointly, or each severally. There is no authority for suing three out of four joint makers. There are exceptions to the rule requiring the proceeding to be against all jointly, as where one is an infant, or one has been discharged in bankruptcy; but this case is not within the exceptions. The discontinuance against James Jenks & Co. operated as a discontinuance against all of the defendants, and the case should have ended there. *Anderson v. Robinson,* 38 Mich. 407; *Munn v. Haynes,* 46

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Id. 140 (9 N. W. Rep. 136); *Post v. Shafer*, 63 Id. 85 (29 N. W. Rep. 519); *Winslow v. Herrick*, 9 Id. 380.

The judgment must be reversed, with costs of both courts; and, as there can be no recovery under the pleadings, no new trial will be awarded.

The other Justices concurred.

NATHAN H. VINCENT v. DANIEL BOWES.

Writ of error—Does not lie to review discretionary order of circuit judge.

The action of the circuit court in denying an application for leave to appeal from a justice's judgment, under How. Stat. § 7005, on the ground that the appellant was prevented from taking an appeal within the statutory time by causes beyond his control, can only be reviewed on *mandamus*.

Error to Mecosta. (Palmer, J.) Argued October 23, 1889. Decided December 28, 1889.

Defendant brings error from an order denying his application for leave to appeal from a judgment in justice's court. Writ dismissed. The facts are stated in the opinion.

Dumon & Cogger, for appellant, contended that the showing was sufficient.

M. Brown, for plaintiff, contended:

1. Error does not lie in a case like this. It is not a proceeding according to the course of the common law, or analogous thereto; citing *Brinsmade's Appeal*, 52 Mich. 537; *Fletcher v. Clark*, 39 Id. 374; and such a motion as this is a special proceeding; citing *McCaslin v. Camp*, 26 Id. 392.

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2. *Capwell v. Baxter*, 58 Mich. 571, is the only case where a writ of error was issued in such a proceeding as this, and in that case the jurisdiction of the court was not questioned.

CHAMPLIN, J. Defendant was prosecuted before a justice of the peace in a civil action, in which a trial was had, and a judgment rendered against him for $60 and costs. He failed to appeal in the time allowed by law, and made an application to the circuit court, under the statute (How. Stat. § 7005), for leave to appeal, alleging that his failure to take one in time arose from causes beyond his control. The granting such leave is in the discretion of the circuit judge, and his action will not be reviewed by us except upon *mandamus*, and in cases where we are fully satisfied that he has abused his discretion.

We are not satisfied that there has been abuse of discretion in this case, on the face of the papers, as made by the petitioner; but, as we cannot review the question upon writ of error, we will dispose of the case by dismissing the writ, with costs

The other Justices concurred.

LOVINA E. COOPER v. ABRAM COOPER.

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Divorce—Cruelty.

Defendant appeals from a decree granting complainant a divorce on the ground of extreme cruelty, which is affirmed. No question of law is involved in the case not fully settled by previous decisions.

Appeal from Washtenaw. (Kinne, J.) Argued October 23, 1889. Decided December 28, 1889.

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Bill for divorce. Defendant appeals. Affirmed. The facts are stated in the opinion.

Uhl & Crane, for complainant, contended:

1. The defendant has not set up a condonation of the acts of cruelty in his answer. If he wished to make that defense, he should have insisted upon it as a defense in his answer.

Frank Hinckley (*Alex. White*, of counsel), for defendant, contended:

1. No divorce shall be decreed if the complainant is guilty of the same misconduct charged against the defendant; citing Act No. 187, Laws of 1887.
2. To entitle a party to a decree for cruelty it must be extreme, entirely subverting the family relation; citing *Cooper v. Cooper*, 17 Mich. 205; *Cox v. Cox*, 35 Id. 461; and it cannot be based on gossip; citing *Soper v. Soper*, 29 Id. 306; nor granted where forbearance would obviate the difficulties; citing *Stafford v. Stafford*, 52 Id. 522; nor where the complainant is maneuvering to obtain a legal advantage; citing *Bishop v. Bishop*, 17 Id. 210; nor for want of support where the wife refuses to live with her husband; citing *Randall v. Randall*, 37 Id. 563; *Cox v. Cox*, 35 Id. 461.

SHERWOOD, C. J. Complainant in this case brought her suit in the Washtenaw circuit court, in chancery, to obtain a decree of divorce from the defendant on the ground of extreme cruelty. The acts of cruelty charged are neglect to support; excluding complainant's children by a former husband from complainant's house and home without cause; using vulgar language to complainant, imputing to her a want of chastity; keeping away from their home complainant's daughters; destroying the affection of their adopted daughter for complainant; threatening to leave complainant; and that he was grossly mean, insulting, and tyrannical to her, compelling her to consult him as to whom she could entertain as her company, and circulating slanderous and defamatory stories about complainant's daughters.

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In the defendant's answer the charges were all denied, or explanations given which were urged as a sufficient excuse for what actually did occur on the specific occasions referred to.

The cause was heard on pleadings and proofs before Judge Kinne, by whom the proofs were taken in open court; and after due deliberation the circuit judge directed the entry of the decree that the marriage between the parties be dissolved, and declined to give costs to either party. Defendant appeals.

We are all satisfied, after a perusal of the record and briefs of counsel in this case, that the learned circuit judge arrived at a correct conclusion. There are generally no questions of law arising in the case not heretofore fully settled by our former decisions in this class of cases; and upon the facts the decree is clearly supported by the evidence, and it must be affirmed.

The other Justices concurred.

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JOHN S. RANNEY v. JAMES DONOVAN.

Contract—Real-estate brokers—Agent for buyer and seller at once —Public policy—Dividing commissions—Evidence.

1. Evidence of a *verbal* option to sell real estate is competent where no question arises as to the enforcement of a conveyance under it,—which has been executed,—but is offered in a suit by the holder of the option to recover his share of the profits realized on a resale of the land by a third party.

2. A plaintiff may state the contents of a receipt presented to him by the defendant, for a certain sum in full of all claims, which plaintiff refused to sign, and returned to the defendant, with-

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out producing the paper or giving notice to the defendant to produce it.

3. A broker who merely brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other.

4. Where the owner places land in the hands of a broker for sale, at a fixed price, who agrees with a second broker, without the knowledge of the owner, that if he will find a purchaser at a specified *increased* price they will divide the profits, and the second broker agrees with a third broker that he may find a purchaser at a still further fixed increased price, and that they shall divide equally whatever he may secure above said last named price, such last contract is not void on the ground of public policy because the land owner and first broker are ignorant of it.

Error to Branch. (Loveridge, J.) Argued November 13, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

H. H. Barlow, for appellant, contended:

1. An option on real estate must be in writing, under the statute of frauds, and it was error to admit parol proof of the fact that Phinney had such an option. An option carries with it the right to sell the land within a limited time, and power to enforce conveyance of the land in case a sale is made, and it must be evidenced by a written instrument; citing *Colgrove v. Solomon,* 34 Mich. 494.

2. It was error to admit the testimony of the witness Ranney as to the contents of the receipt. Both parties resided and did business in Chicago. No notice was given to defendant to produce the paper, nor was its absence in any way accounted for. The well known rule contended for is applicable to receipts; citing *VanNess v. Hadsell,* 54 Mich. 560.

3. The remaining points of counsel are stated in the opinion, with his citation of cases.

F. A. Lyon, for plaintiff, contended:

1. If the option was in writing, the ruling was correct, because

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the rule excluding parol evidence as to written instruments does not apply when the writings are not between parties to the suit; citing Abbott's Trial Ev. 294, 295; Greenl. Ev. § 279; and if verbal, still the ruling was correct, because this action is not brought to enforce a verbal option on land, or a verbal contract concerning land, but to recover money due on a completed and fulfilled contract in writing.

2. The testimony of Ranney as to the contents of the receipt was admissible. It had not been signed and had not become operative as to any one, but was simply submitted to Ranney by Donovan, and his signature requested, which was refused; and Ranney had a right to state what kind of an instrument Donovan had requested him to sign. A contract submitted to a party, but not signed, is not a written contract within the rule excluding parol proof of its contents; citing Whart. Ev. § 1016; and a mere receipt is not within the rule; citing *Bailey v. Cornell*, 66 Mich. 107; and Donovan was a non-resident of the State, and therefore notice to produce was unnecessary; citing *Burton v. Driggs*, 20 Wall. 125-134; *Forrest v. Forrest*, 6 Duer, 102.

MORSE, J. Plaintiff sued defendant in *assumpsit* upon the following contract:

"CHICAGO, Aug. 1, 1885.

"This agreement, entered in and agreed to by James Donovan, of the first part, and John S. Ranney, of the second part.

"That the said Donovan, in case of the sale of certain tracts of pine land in town 37 and 38, range 17 and 18, state of Wisconsin, is to pay the said John S. Ranney one-half of any price that may be obtained above one dollar and sixty-five cents per thousand ($1.65); the guaranty cut being 23,000,000 on the green tract and 25,000,000 on the red; the net price of the red tract to be forty-seven thousand dollars ($47,000). It is hereby mutually agreed that the said Donovan and Ranney shall share equally in all margins obtained above said price.

"J. S. RANNEY. [L. S.]
"JAS. DONOVAN. [L. S.]

"*Chicago, Aug.* 1, 1885."

The following facts were shown by plaintiff: In the year 1885, Sawyer, Goodman & Co., of Chicago, were the owners of a tract of pine land containing 2,240 acres, and

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Wilhelm Boeing, of Detroit, was the owner of another tract of pine land, containing 1,680 acres. These tracts were situated in the state of Wisconsin. In that year, George S. Phinney, John O'Callahan, and John S. Ranney, the plaintiff, and James Donovan, the defendant, were real-estate brokers, doing business in Chicago and elsewhere. In the early part of 1885, Sawyer, Goodman & Co. entered into an arrangement with Phinney whereby it was agreed that, if Phinney should bring said Sawyer, Goodman & Co. a purchaser for the "Goodman Tract" at the price of $44,800, he should receive a commission of $2,600. At the same time, O'Callahan had an arrangement with Boeing, whereby it was agreed that, if O'Callahan should bring said Boeing a purchaser for said "Boeing Tract" at the price of $33,000, he was to receive a commission of $3,000. O'Callahan and Phinney had agreed to work together in procuring a purchaser or purchasers for both tracts of land. Phinney went to Ranney, and gave to him the plats of these lands, upon which plats the Goodman tract was marked red and the Boeing tract green, and said:

"If you can find a purchaser for these lands we will divide."

Subsequently, Phinney, Ranney, and O'Callahan, as the two former testify, made an agreement to share the profits on these two tracts of land together with a fourth person. O'Callahan denies that he was a party to any such arrangement. Phinney and Ranney agree that they fixed the price of the lands to be sold by them at $1.65 per 1,000, and they were to divide the difference between $77,800 and the sum they should realize from the sale at $1.65 per 1,000 among the four.

Ranney made the contract with Donovan without the knowledge or consent of Phinney or the others. Ranney

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and Phinney finally agreed to sell the Goodman tract, as Phinney testifies, for $47,800, and to divide the difference between that sum and $44,800. Ranney introduced Donovan to Phinney, and Phinney brought Donovan and Sawyer, Goodman & Co. together. Donovan paid the latter $44,800, and they deeded him the land. He paid Phinney $3,000 at the time the sale was closed, or soon thereafter. Ranney was not present when the sale was made.

Ranney claims that he is entitled in this suit to one-fourth of the difference between $44,800 and $47,000, to wit, $550. Donovan sold this tract for $50,000, or at $3,000 advance, one-half of which profit Ranney also claims, making in all, upon the Goodman tract, the sum of $2,050.

In relation to the Boeing tract, and the sale thereof, the plaintiff knows nothing, except by hearsay. Phinney, who testifies for plaintiff, and O'Callahan, who was a witness for defendant, tell different stories of the transaction. Phinney testifies that after Donovan wanted the lands he wrote to O'Callahan, who lived at Hancock, Michigan, and who, in response to his letter, came to Chicago. Ranney, Phinney, and O'Callahan met in Chicago. Donovan was also present. It was there agreed that Donovan and O'Callahan should go to Detroit, and close the matter up with Boeing. The testimony of Phinney and plaintiff tends to show that this land was to be taken by Donovan in the same way as the Goodman tract; the difference between the amount realized at $1.65 per 1,000 and $33,000 to be divided between Phinney, plaintiff, O'Callahan, and another. O'Callahan testifies that he knew nothing of Ranney in this transaction; that he received a letter from Donovan, and went to Chicago upon its receipt; that at this time his option on the

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Boeing tract had expired; that he went to Detroit with Donovan, and there saw Boeing and his agent, Zeba T. Graham, and there they made a trade for the land, Donovan paying Boeing $33,000 for the same. Donovan paid O'Callahan $3,000 commission on this sale. Donovan afterwards sold this tract at $2 per 1,000. This tract was guaranteed in the contract at 23,000,000 feet; but plaintiff admits that it only amounted to, and was sold on the basis of, 21,300,000 feet, while Donovan claims he only realized $2 per 1,000 on 20,300,000 feet. Plaintiff claims on this sale one-quarter of the difference between $35,145 and $33,000; such difference being $2,145, and one-quarter of the same, $536.25. He also claims under the contract with Donovan one-half of $7,455; that being the difference between 21,300,000 at $2 per 1,000, to wit, $42,600, and the same number of feet at $1.65 per 1,000, to wit, $35,145.

Plaintiff's claims sum up as follows:

One-fourth of commission on Goodman tract	$ 550 00
One-half Donovan's profits	1,500 00
One-fourth commission Boeing tract	536 25
One-half Donovan's profits	3,727 50
	$6,313 75

He recovered judgment for $7,352.15. The defendant admitted making the contract, as above set forth, with plaintiff, but claims that Ranney represented to him that he held the option for these lands direct from the owners. He supposed that the only commission Ranney was to receive was the half he would get under this contract, which he understood Ranney would have to divide with three others. After the contract was made, defendant testifies that Ranney introduced him to Phinney. He asked Phinney if he was the owner, and he said he was not. Defendant then and there told plaintiff that he repudiated the contract. He thereafter acted with

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Phinney and O'Callahan, and paid no further attention to plaintiff or the contract. Did not buy the lands under the contract, but by an arrangement of his own with Phinney and O'Callahan. Went with Phinney to Sawyer, Goodman & Co., and bought the land of them, and paid Phinney $3,000 for his commission. Went with O'Callahan to Detroit, and bought the land of Boeing, and paid O'Callahan $3,000 commission. He took one L. S. Baker in with him upon the Boeing tract, and paid to him one-half of the profits he made on that sale. He does not state the amount he paid to Baker, but testifies that he sold on the basis of 20,300,000 feet. This would have made Baker's half of the profits $2,727.50. Baker, however, testifies as a witness for plaintiff, that the profits were $7,455, one-half of which would be $3,727.50, and that defendant gave him a check for this amount.

We think error was committed by the court below in submitting to the jury plaintiff's claim for one-fourth of the commissions paid to Phinney and O'Callahan. It plainly appears from plaintiff's own showing that Phinney acted for plaintiff and the other brokers, with whom he was to divide the commission in this sale from Sawyer, Goodman & Co. to Donovan, and Donovan was justified in paying the commission to Phinney. Plaintiff and the other brokers must look to Phinney for their share, and not to defendant. The same principle applies to the Boeing tract, but with greater force, under the testimony, as it is doubtful if plaintiff had any claim upon the commission in that sale. If he has any such claim, he must look to O'Callahan, and not to defendant. This disposes of $1,086.25 of plaintiff's claim; and the court should have so instructed the jury, as requested by defendant's counsel. There was no testimony tending to show that Donovan ever agreed to pay this one-fourth, in either

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case, to plaintiff, or that such one-fourth was demanded of him before he paid it over to Phinney and O'Callahan.

There were no errors in the admission of testimony. It was competent for plaintiff to show that he had a verbal option to sell these lands, as between him and the defendant. No question arises in this case as to the enforcement of a conveyance under this option. The land was conveyed; and the plaintiff had the right to show that he was verbally authorized by Phinney to sell the lands at a certain price, and that Phinney was authorized by the owners to sell at another price, as bearing on the questions involved in this case.

It was also proper for him to show that in a conversation with Donovan the latter presented him with a receipt, and requested him to sign it in full, on payment of $1,086.25, which receipt he read, and handed back to Donovan, declining to take that amount, or to sign the receipt, and to state what the receipt contained, without producing the same, or giving notice to Donovan to produce it. The receipt was not executed, or relied upon as an executed paper. It was simply a part of the conversation, the same as if Donovan had read to him, or handed him to read, any other written or printed communication, and kept it, or received it back again into possession. Whart. Ev. § 1016. This testimony could not have hurt the defendant, any more than a statement by plaintiff that defendant asked such a receipt from plaintiff, without having one already prepared in writing. The defendant could deny the fact sworn to in either case, and his denial would be of equal force to meet plaintiff's assertion.

Defendant's counsel requested the court to direct a verdict in behalf of his client. This was properly refused. In regard to the Boeing tract, the testimony tending to

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show that Donovan was acting in that purchase under his contract with plaintiff was not very strong; but still we think there was sufficient evidence to go the jury, who were properly instructed that the burden of proof was upon the plaintiff.

It is strenuously argued here that the contract between Ranney and Donovan was against public policy, and that this should have defeated plaintiff's recovery; that the testimony shows that neither the owners of the land, nor Phinney or O'Callahan, knew of the contract between Ranney and Donovan; that Ranney was the agent of Phinney for the sale of these lands, and was getting both a commission from the seller and the buyer; and that he was neglecting his duty to his principal, Phinney, when he undertook to gain additional compensation for himself. The counsel for defendant cites the following cases in support of his contention: *Scribner v. Collar*, 40 Mich. 375; *Walker v. Osgood*, 98 Mass. 348; *Smith v. Townsend*, 109 Id. 500; *Rice v. Wood*, 113 Id. 133; *Lynch v. Fallon*, 11 R. I. 311; *Everhart v. Searle*, 71 Penn. St. 256; *Raisin v. Clark*, 41 Md. 158; *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Oscanayan v. Arms Co.*, 103 U. S. 261.

These authorities, in my opinion, do not apply. In this case neither the buyers nor sellers of these lands were defrauded by the transaction, and they are not complaining. Both Sawyer, Goodman & Co. and Boeing had fixed the price upon their lands before this contract was made, and had in effect agreed that the brokers Phinney and O'Callahan could sell their lands at a certain price to them, without reference to what the brokers might get for the same from the buyers. Donovan, from his own showing, was a broker, and was buying these lands to sell again. The price at which he took them was also fixed when he made his contract; and he paid without question the difference between what he was to pay the

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brokers Phinney and O'Callahan and the purchasers to such brokers, and yet did not pay more than his contract price with plaintiff. It is claimed that Phinney would be defrauded if plaintiff is allowed to recover, as he testifies that he did not know that plaintiff was to have half of Donovan's profits, and that such arrangement was made by Ranney without his consent, and contrary to the agreement he had with Ranney. But it appears, from Phinney's testimony as well as Ranney's, that they had agreed to sell the Goodman tract at $47,000, and the Boeing tract at $1.65 per 1,000, before the contract was entered into between Ranney and Donovan. The case, then, stands like this: The owner of lands says to broker A., "You may sell this land for me at a certain price," say $10,000. Broker A. says to broker B., "You may find a purchaser at $11,000, and we will divide the profits." Broker B. then makes a contract with broker C. that C. may sell the land for him at $11,000, and share with him half of all C. may obtain over the $11,000. C. sells for $12,000, and refuses to divide with B., upon the ground that the contract, not being known to A. or the owner of the land, is against public policy. If this contention be correct, then there can be but one middleman between the buyer and the seller, without the consent and knowledge of all the parties connected with the sale and purchase. We do not think the law goes as far as this. The rule invoked by defendant's counsel applies to such a case as *Scribner v. Collar, supra.* In that case no price was fixed by the seller, but Scribner and Potter agreed to take the farm property of Collar for sale or exchange at a commission of 2½ per cent. At the same time they had a similar contract with persons by the name of Warren, who also had a farm for sale or exchange. Of this Collar was ignorant. A trade between Collar and the Warrens was effected. Here the Court held Scribner and Pot-

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ter were the agents of both parties to the trade. They were not employed simply as middlemen to bring the parties together.

"It [the contract] conferred authority to negotiate, and reposed confidence, and contemplated that the plaintiffs should act in defendants' interest, and should exert their judgment and their influence in their behalf."

For this reason it was held that public policy would not admit of Scribner and Potter being in the employ of both parties.

In this case at bar, Ranney had no power to negotiate; and no confidence was reposed in him that he should use his best judgment and efforts to get a large price for the lands. All he was to do was to find a purchaser at a certain sum, fixed and agreed upon. When he did this, he was entitled to all he could get out of the purchaser over and above such price. The owners of the land were not to pay him anything, and his compensation from Phinney depended upon the agreement made between them to sell the land at a fixed price above what the owners asked, and to share the profits together. Neither his efforts nor judgment were to be employed to get a greater price. It may be that there was such a copartnership or joint dealing between himself and Phinney as would entitle Phinney to share in his contract with Donovan (see *Grant v. Hardy*, 33 Wis. 668); but this could not affect his right to recover from Donovan. Donovan agreed to pay Ranney one-half of the profits made by him over and above a fixed sum, which was named, for each piece of land; and there was no fraud upon him in the transaction. He made the agreement with his eyes open; and it could make no difference to him to whom he paid the purchase price, which was fixed by his contract. He does not complain of any fraud upon himself, but sets up the fraud of Ranney against

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Phinney in his defense. This he cannot do, as he is not concerned with it, if it exists. *Hardy v. Stonebraker*, 31 Wis. 640. It has been held, and I think correctly, that a broker who merely brings the parties together, and has no hand in the negotiations between them, and where they make their own bargain without his aid or interference, can receive legally a compensation from both of them, though each was ignorant of his employment by the other. *Mullen v. Keetzleb*, 7 Bush, 253; *Herman v. Martineau*, 1 Wis. 151; *Grant v. Hardy*, 33 Id. 668; *Rupp v. Sampson*, 16 Gray, 398; *Collins v. Fowler*, 8 Mo. App. 588; *Orton v. Scofield*, 61 Wis. 382 (21 N. W. Rep. 261); *Barry v. Schmidt*, 57 Id. 172 (15 N. W. Rep. 24).

This is the case here. No confidence was reposed in Ranney, by anybody, that he would exert his skill or judgment to get as large a sum as possible for the lands, or, on the other hand, to procure the same for as low a price as possible. He was simply acting as a go-between,—a middleman,—to bring the buyer and seller together, to make their own bargain; the seller having fixed his price to start on. This was all he did. The fact that he received the right to act through or from another middleman, or turned the matter over into the hands of another broker, upon a contract with him to share half of the price obtained by such broker over and above the price fixed by him and Phinney as the selling price of the lands in their hands, does not render the transaction void as against public policy, and is no defense against the contract by Donovan. *Stewart v. Mather*, 32 Wis. 344; *Hardy v. Stonebraker*, 31 Id. 640.

We find no other errors in the record. For those noted the judgment must be reversed, and a new trial granted, with costs of this Court to defendant.

The other Justices concurred.

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In the Matter of the Estate of Annie Livernois (a minor). Julia A. Livernois, Claimant, v. David King, Administrator, etc.

Guardian and ward—Allowance of final account—Parent and child—Services of minor child—Support.

1. Ordinarily the parent is entitled to the services of a minor child, but is also liable for its support and maintenance. These services and this support are considered as reciprocal, and there is no justice in allowing the parent (who is also guardian) a yearly sum for the care and support of the child, while at the same time in receipt of the child's services while at home, or its wages while working away from home.
2. In this case a guardian is allowed $25 per year for twelve and one-half years, for clothing, and making of same, for a child who was seven years of age when taken by the guardian, as a just remuneration in the absence of any itemized account of such expenditures.

Error to Wayne. (Brevoort, J.) Argued October 23 and 24, 1889. Decided December 28, 1889.

Appeal from allowance of guardian's final account by circuit court on appeal from probate court. Allowed in part and rejected in part. The facts are stated in the opinion.

Fraser & Gates, for contestant and appellant.

Willard M. Lillibridge, for claimant.

Champlin, J. This is an appeal from an order allowing a guardian's final account. The circuit court allowed the account at $1,666.24.

I think the circuit judge was right in disallowing the items of credits in the account of the guardian for paying Bushey for care of minor when sick; also one-half

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expenses in moving house; and also for her board and wages while at Bushey's, and her wages while at Stark's. These items disallowed amounted to $202.30.

I further think the whole charge for care, maintenance, and support of the minor from November 8, 1869, to November 22, 1886, amounting to $1,600, should also be disallowed. The testimony shows that the guardian has had all the income and profits of the minor's share of the use of the real estate; that the guardian has received moneys as the avails of wood sold and rent of farm, as well as all the labor of her daughter until she was married, in 1886. She neglected to give her a common-school education, but what services she has rendered, her mother, the guardian, has had the benefit of.

Ordinarily the parent is entitled to the services of the minor child, but the parent is also liable for its support and maintenance. These services and support are considered as reciprocal, and I can see no justice in allowing the mother $100 a year for care and support, while she at the same time was in receipt of her child's services while at home, or her wages while she worked away from home.

Her ward was sick with paralysis when she was nine years of age, but her mother did not expend her own means for physicians' bills, nor did she care for her. The attack was not permanent. She gradually grew better, and by the time she was ten she was troubled no more from it. The guardian, however, applied to and received a license from the probate court authorizing her to mortgage a parcel of land belonging to her ward, representing to the court that Annie had been stricken with partial paralysis which confined her to bed, and under the care of a physician; that she had incurred a large debt for Annie, and she was still under the care of a physician. Under this license she, on February 24,

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1887, executed a mortgage to Charles A. Warren for $300, at 10 per cent. interest. She did not use this money for the purposes for which she obtained it, and only a portion of it for Annie's benefit. She produces receipts showing that she paid the physicians for attending Annie $33.50. An account was kept by her son of the expenditures of this $300, which shows that all that was expended for Annie's benefit amounted to $25.70. The rest she expended in various ways. Some she loaned out, some she used to purchase groceries, and some for oats and hay. She afterwards applied to the circuit court for the county of Wayne, and obtained permission to and did sell one of the lots belonging to her ward for $400, for the purpose of raising money to pay this same mortgage. The further item of June 3, 1880, credited to her for balance paid on the mortgage to C. A. Warren, must also be disallowed, and the interest thereon. The original item is $33.11, and the interest $16.40. She sold the lot to pay this mortgage to her son-in-law for $400, and the records in Wayne circuit court show that the grantee by the acceptance of the deed,—

"And in consideration thereof, undertakes and promises to pay and discharge the mortgage now being on said lot of land."

This lot was the same lot mortgaged to Warren.

The account, as filed by the guardian, shows that she has received cash belonging to the estate of her ward, $676.98, and that she has paid out cash, properly chargeable against the estate of her ward, $667.43. She has rendered no account of wood and square timber sold off from the Ecorse farm, which the testimony shows was considerable. Annie's share would be one-ninth.

The guardian credits herself with the following items:

Clothing and making same from Nov. 28, 1869, to Nov. 4, '84, 15 years, at $25	$375
Clothing and making same from Nov., 1884, to Nov., 1886, two years, at $50	100

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These items are not supported by proofs or vouchers. Twenty-five dollars a year for a child of the rank and station of this is exorbitant. She was not appointed guardian until 1874, and at that time Annie was seven years old. The circuit judge allowed for clothing and making from March 25, 1874, to November 8, 1884, at $25 a year, ten years and one-half; and for two years thereafter at the rate of $50 a year. Why a rest was made in 1884 does not appear, and I do not think any rest should be made at that point. It was doubtless worth more to clothe Annie the last six years than it was the first, when she was from seven to thirteen years old. But I think an average of $25 a year for the whole time, not including the charge for the wedding outfit, will, in the absence of any satisfactory testimony, and in the absence of any account of expenditures, be as near just as can be arrived at. I shall allow $312.50 for clothes and making, and disallow the excess in the above two items, amounting to $162.50.

I think all items of interest should be struck out of both sides of the account. The receipts and disbursements were nearly cotemporaneous, and they stood in open accounts; and also the item for one-half expenses of sidewalk in front of lot 60 should be disallowed.

In conclusion, I disallow all items for interest upon both sides of the account. I disallow the following items credited to the guardian:

Care, maintenance, and support of the minor from death of her father, November 8, 1869, to her marriage, November 22, 1886, less 1 year at F. X. Stark's, 16 years, at $100 per year	$1,600 00
Clothing and making same from November 8, 1869, to November 8, 1884, at $25 per year, and ditto for 2 years at $50 per year, disallowed	162 50
Paid V. Bushey, for care of said minor, when sick	80 00

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Paid one-half expense of moving house on said minor's lot 60	25 00
Paid one-half expense of building sidewalk in front of lot 60, 72 feet	8 82
Paid balance of mortgage to C. A. Warren, recorded Liber 132, p. 302	33 11

The total amount of credits due to the guardian, and allowed her, is $990.21. The total amount of debits charged to her is $676.98. Balance due guardian, $313.23.

Let it be certified to the circuit and probate courts that the amount due the guardian, upon settlement of her final account, is the sum of $313.23. The appellant will recover costs of both courts.

The other Justices concurred.

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DERK SNELL v. WILLIAM E. RACE.

Constitutional law—Validity of personal judgment in proceedings under void lien law.

In this case, the judgment, so far as it establishes a personal liability against the defendant, is affirmed, but is held void so far as it gives plaintiff a lien under the mechanics' lien law of 1887, which was held unconstitutional in *John Spry Lumber Co. v. Loan & Trust Co.*, 77 Mich. 199.

Error to Kent. (Judkins, J., presiding.) Argued October 24, 1889. Decided December 28, 1889.

Proceedings under mechanics' lien law of 1887. Defendant brings error. Reversed as to lien. Personal judgment affirmed. The facts are stated in the opinion.

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Nathan P. Allen, for appellant.

More & Wilson, for plaintiff.

SHERWOOD, C. J. The plaintiff in this case was a contractor, and resided in the city of Grand Rapids.

On November 14, 1887, he entered into a written contract with the defendant to build him a house on his lot on Third avenue in said city, for $1,066.79. When plaintiff completed the house, he had not yet received all his pay for the job; and he filed a notice of lien on the premises July 30, 1888, claiming $250.84 as the amount due him, and served defendant with a copy of the notice, personally, on August 4, 1888. August 29, 1888, plaintiff filed in the register's office a sworn statement of account. Service of a copy of the statement of account could not be made on that day, as defendant was absent from the county, but service was obtained in the county the next day; and on September 22, 1888, and before commencement of suit, proof of service of the notice of lien and of the statement of account on the defendant were filed in the office of the register of deeds. On the same day this suit was commenced in the circuit court for the county of Kent to enforce the lien. The cause was tried before Judge Judkins and a jury January 15, 1889, and resulted in a verdict for $157 in favor of plaintiff, and giving him a lien therefore on the premises described in the notice of lien.

Defendant brings error, and asks to have that part of the judgment giving plaintiff a lien on the premises reversed. It will be noticed that he does not assail the correctness of the judgment for $157 in favor of plaintiff. There is no question that defendant is indebted to plaintiff to this amount for labor and materials used in his house; but it is claimed that the court erred—

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1. In holding that the proceedings taken by plaintiff to establish the lien were regular.

2. In holding that the description of the property contained in the contract between the parties was sufficient under the statute requiring the contract to be in writing, and signed by the owner's wife, where improvements are made upon a homestead.

Defendant further claims that the court erred in excluding the evidence offered to show that the property in question was defendant's homestead.

The action in the case is brought under Act No. 270, Laws of 1887. This law, by a recent decision of this Court, has been declared unconstitutional.[1] The judgment is therefore void, so far as relates to the lien.

There is no question made as to the correctness of the account which passed into the judgment, as between these parties. The merits of the claim against the defendant have been adjudicated upon a common-law issue, and each party has had his day in court upon such issue, and there is no reason why that portion of the judgment should not stand; but it must be reversed as to the lien; and inasmuch as the point which is here made, and upon which the reversal of the proceedings, so far as they relate to the lien, is had, was not raised in the court below, nor in this Court until the hearing was had, we think no costs should be granted in this Court. The judgment, modified as herein indicated, will be affirmed.

The other Justices concurred.

[1] See *John Spry Lumber Co. v. Loan & Trust Co.*, 77 Mich. 199.

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ELBRIDGE E. HUTCHINSON v. DOUFF POYER ET AL.

Sale—Good faith—Relationship of parties—Evidence—Value of goods—Price realized at auction sale—Fraud—Burden of proof.

1. The evidence of a boot and shoe dealer who was present when a stock of boots and shoes was inventoried by attaching creditors, and set down the amount of the appraisement as given to him by the appraisers, but who did not look over the goods to any extent, but noticed that they were in fair condition and comparatively new, but did not make sufficient examination to give an opinion as to the *exact* value of the goods, is admissible, and the weight to be given to it is for the jury.
2. Evidence of what property brought at auction is admissible as having some tendency to prove value. *Smith v. Mitchell*, 12 Mich. 191; *Davis v. Zimmerman*, 40 Id. 28; *Dyer v. Rosenthal*, 45 Id. 590.
3. One who impugns a transaction as fraudulent which may or may not be so is not sustained by his own assertion alone in case he is disputed, but must make his allegation good by independent evidence. *Darling v. Hurst*, 89 Mich. 766.
4. It is error to instruct the jury, in a suit by a vendee to recover the value of goods from the attaching creditors of his vendor, that the plaintiff had made out a *prima facie* case by proving the sale to him of the goods, other facts being shown by plaintiff's testimony which might also have weight with the jury in determining the *bona fides* of the purchase.

Error to Menominee. (Grant, J.) Argued November 1, 1889. Decided December 28, 1889.

Trover. Defendants bring error. Reversed. The facts are stated in the opinion.

Sawyer & Waite, for appellants.

W. H. Phillips (*H. O. Fairchild*, of counsel), for plaintiff.

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[The points of counsel are stated in the opinion.—REPORTER.]

LONG, J. Plaintiff purchased a stock of goods of one Ettinger, his brother-in-law, about January 1, 1888, paying therefor $3,023.91. Payment was made as follows. At the time of the purchase plaintiff surrendered to Ettinger some $800 in notes, which Ettinger had before that time given him for borrowed money, and the balance of the purchase price was paid by plaintiff giving Ettinger his notes due in one, one and a half, and two years. Plaintiff claims to have made the purchase upon an inventory made by Ettinger a few days previous, and that after the purchase he went into possession of the goods and store where they were situated, and continued the business until the 5th of that month, when the defendant Poyer, a deputy-sheriff of Menominee county, seized the goods upon several writs of attachment issued out of the circuit court for that county against Ettinger at the instance of his creditors. Bonds of indemnity were given the deputy-sheriff, the other defendants being the sureties in such bonds. The goods were afterwards sold by the officer. This is an action of trover by the plaintiff to recover the value of the goods. On the trial plaintiff had verdict and judgment for $2,534.99. Defendants bring error.

The first assignment of error relates to the ruling of the circuit judge in permitting witness Worden to testify to the value of the goods. Defendants' counsel contend that the witness was not experienced in the business, and that he had made no examination whatever of the stock. Witness testified that he was a boot and shoe dealer; that he set down the amount given him by the appraisers at the time the appraisal was taken under the attachments, but that he did not look the goods over to any

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great extent, but noticed they were in fair condition, and comparatively a new stock, but that he did not make sufficient examination to give an opinion as to their exact value. Witness was then allowed by the court, under the objection of defendants' counsel, to give his opinion that the stock was of the value of about $2,500. While the testimony of this witness was not of much weight, it was not error to admit it. He was there, and assisted in the inventory, taking down the amounts as they were announced by the appraisers, to some extent looked over the stock, and was engaged in that line of business. The weight to be given to his testimony was for the jury.

Defendants base their second assignment of error on the ruling of the court in excluding the testimony offered by them as to what the goods sold for It appears that the goods were sold by the officer at public auction under executions issued upon judgments obtained in the attachment proceedings, and the defendants sought to show on the trial what the goods sold for at auction. The court excluded this, and charged the jury upon that subject as follows:

"Counsel have said something in their arguments, I think on both sides, in regard to the amount for which these goods were finally sold by the officer. Gentlemen, there is no evidence in the case as to what they were sold for. I excluded that from the evidence in the case."

Counsel for plaintiff, while admitting that there is no dispute as to the rule of law holding evidence of such a sale competent as tending to show value, insist that the evidence offered did not tend to show that the question was directed to a sale by the officer at public auction. In this counsel are in error. The question was evidently directed to that point, and from the charge of the court it is evident the court so understood it, and excluded it.

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It has been well settled that evidence of what the property brought at auction is admissible, as having some tendency to prove value. *Smith v. Mitchell,* 12 Mich. 191; *Davis v. Zimmerman,* 40 Id. 28; *Dyer v. Rosenthal,* 45 Id. 590 (8 N. W. Rep. 560); *Campbell v. Woodworth,* 20 N. Y. 499.

One further point made by defendants' counsel remains to be noticed. It is contended that the court was in error in its charge as to the burden of proof. The court instructed the jury.

"The plaintiff has made out his case by proving the sale. The burden of proof is upon him to make out a *prima facie* case of the sale. He did that by his testimony. Then the burden of proof shifts to the other side to prove that the sale was fraudulent and void, under the instructions I have given you and which must be proven by a preponderance of evidence. Therefore you must find, in order to find this sale was void, that the defendants have a preponderance of evidence; that is, that the testimony is stronger that the sale was void than it is that it was valid."

It is an elementary principle that he who impugns a transaction as fraudulent which may or may not be so is not sustained by his own assertion alone in case he is disputed, but has the burden on him to make his allegation good by independent evidence; for he who alleges that a transaction was fraudulent must prove it. *Darling v. Hurst,* 39 Mich. 766; *Bixby v. Carskaddon,* 70 Iowa, 726 (29 N. W. Rep. 826); *Rochester v. Sullivan,* 11 Pac. Rep. 58.

It is evident, however, that the court went too far in his instruction when he told the jury that the plaintiff had made out his case by proving the sale to him of the goods, and that, while the burden of proof was upon him to make out a *prima facie* case of the sale, he had done this by his testimony. The purchaser here was the moving party. He claimed to have purchased the property

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from Ettinger in good faith, and without notice that Ettinger was indebted to these attaching creditors, and that the attachments were wrongfully levied, and seeks to recover the value; but the manner of payment might have influence upon the jury in determining whether the purchase was made in good faith. Other facts were shown by the plaintiff's testimony which might also have weight with the jury in determining the *bona fides* of the purchase.

It appeared that the plaintiff was living at that time in another state. His business was that of a physician, and he had no acquaintance with the boot and shoe trade. All he knew of the stock was from an examination of the inventory which Ettinger had made, except as he compared the prices in the inventory with the cost-marks on some of the goods; but he does not claim to have gone over the stock to ascertain the correctness of the inventory, and says that the reason he did not do so was his confidence in Ettinger. He gave his notes for $3,023.91, due in one, one and a half, and two years, except the $800 which he held against Ettinger and surrendered, yet on the trial all that was claimed as the value of the goods was $2,500. It appears, therefore, if the plaintiff's testimony is true that he purchased in good faith, that he was giving his notes for something over $500 more than the value of the property purchased. Again, the relationship and surroundings of the parties was a matter for the consideration of the jury in determining the good faith of the purchase. These were circumstances which the court should have submitted to the jury in determining the question of plaintiff's good faith in the purchase, and that it was not made to hinder, delay, or defraud creditors. It was error for the court to assume in this instruction that the plaintiff had made a *prima facie* case by his own testimony.

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For the errors pointed out the judgment must be set aside, with costs, and a new trial ordered.

The other Justices concurred.

EUGENE F. AVERILL v. MARY R. WOOD, ADMINISTRATRIX, ETC.

Fraudulent representations—Promissory note—Qualified indorsement—Ignorance of import—Release of right of action—Consideration—Signature obtained by fraud—Pleading—Declaration—Evidence—Charge to jury.

1. An arrangement by the receiver of a corporation to pay its outstanding note in lumber amounts to an acceptance of the note to the common understanding.
2. To hold that a man cannot be defrauded by false representations because he is presumed to know the law, which presumption is a violent one in most cases, is to place the ignorant and foolish, who are generally the victims of fraud, beyond the protection of the law. *Hess v. Culver*, 77 Mich. 598 (headnotes 1 and 3).

   So *held*, where a plaintiff claimed to have been defrauded in the purchase of the note of an insolvent corporation by representations that its receiver had arranged to pay the note in lumber, which arrangement it was claimed the receiver had no power to make, for which reason the plaintiff had no right to to rely thereon.
3. Where, in a suit for damages for alleged fraudulent representations by which plaintiff was induced to purchase a note, the jury find that the fraud was committed as claimed, evidence that the defendant said he would guarantee that the note would be paid is admissible as a part of the transaction, if the jury find that such promise was made to aid in the fraud perpetrated on the plaintiff.
4. The law approves of settlements and compromises of disputed claims, and, when deliberately made, the parties are bound by them, and the law will not sanction any interference with them,

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without the consent of the parties, except upon the ground of fraud or mistake.

5. The purchase of property of a wife, at the request of her husband, upon the condition that the husband would sign a release of all of his claims against the vendee, is a sufficient consideration for such release.

6. Where, in such a case, the husband was induced to execute such release by fraudulent representations that it was not binding, and would not be used against him, and his wife receives the entire benefits of the transaction, the husband is not estopped from repudiating the release for fraud because of the non-return of such benefits by the wife.

Error to Kent. (Grove, J.) Argued October 25, 1889. Decided December 28, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Taggart, Wolcott & Ganson, for appellant, contended:

1. Fraud must be clearly proved; citing *Powers v. O'Brien*, 44 Mich. 317; *Campau v. Lafferty*, 50 Id. 114; *Brown v. Dean*, 52 Id. 267; and the facts constituting the fraud must be proved as set forth; citing *Collins v. Jackson*, 54 Mich. 186.

2. A receiver has no power to make contracts without the authority of a court, and all persons contracting with him are chargeable with knowledge of his functions and powers; citing High, Receivers (2d ed.), § 186.

3. Even though the question of fraud in the release was open on the trial below, the statement claimed to have been made by Donaldson, that this paper was not good because of lack of consideration, would at most be only an expression of a legal opinion, and, he not occupying any position of trust towards plaintiff, no charge of fraud could be based upon it; citing Cooley, Torts, 484, and cases cited; *Upton v. Tribilcock*, 91 U. S. 45; *Starr v. Bennett*, 5 Hill, 303; *People v. Supervisors*, 27 Cal. 656; *Clem v. Railroad Co.*, 9 Ind. 488; *Townsend v. Cowles*, 31 Ala. 428; *Steamboat Belfast v. Boon*, 41 Id. 50.

4. Plaintiff is estopped from retaining the benefits of the settlement, and at the same time avoiding it on the alleged ground of irregularity and fraud; citing *Craig v. Bradley*, 26 Mich. 354; *Dunks v. Fuller*, 32 Id. 242; *Crippen v. Hope*, 38 Id. 344; *Lumber Co. v. Gustin*, 54 Id. 631.

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Ward & Ward, for plaintiff, contended for the doctrine stated in the opinion.

MORSE, J. The plaintiff alleges that on November 18, 1887, he was induced to take of Isaac W. Wood, in payment of real estate sold to said Wood, two certain promissory notes, as follows:

"$500.00. GRAND RAPIDS, MICH., Dec. 22, 1885.
"Three months after date, for value received, the Newaygo Manufacturing Co. promise to pay to the order of Isaac W. Wood five hundred and no-100 dollars, at Old National Bank, Grand Rapids.
"No. 258. NEWAYGO MANUFACTURING CO.,
"By A. J. DANIELS, Vice Prest.
"Countersigned by G. H. HOBART, Treas."

Upon the back of said note are the following indorsements:

"Rec'd by bill rend. June 2, '86, two hundred fifteen and 17-100 dollars.
"Rec'd by statement rendered Nov. 14, '87, seventy-eight and 83-100 dollars.
"Pay Eugene F. Averill without recourse.
"ISAAC W. WOOD."

"$600.00. SPARTA, MICH., Nov. 16, 1881.
"Forty-five days after date I promise to pay to the order of Isaac W. Wood six hundred and no-100 dollars, at the First National Bank, Grand Rapids, value received, with interest at eight per cent. per annum.
"No. —. Due Jany. 3d. E. BRADFORD."

Upon the back of said last note was the following indorsement:

"Pay Eugene F. Averill without recourse.
"ISAAC W. WOOD."

That the said Wood then and there falsely and fraudulently represented and warranted that the note signed by Bradford was good and collectible for its face value, and interest from its date, and that there was due about $900 upon it, and that Bradford was pecuniarily responsible

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for the amount of said note, and would pay the same to plaintiff; and also falsely and fraudulently represented that the other note was good and collectible for its face value, with interest, less the amount of the indorsements thereon, payable in lumber by the receiver of said Newaygo Manufacturing Company; and that he had an arrangement with said receiver by which the note should be paid in lumber when called for, which arrangement the receiver would carry out; and that said company had, since the appointment of said receiver, paid in lumber, to apply on said note, the sum of $78.83, which payment Wood indorsed on the back of said note at the time of the transfer to plaintiff; that he took these notes for the sum of $1,128; confiding in and relying upon such representations, and deeded his real estate to said Wood; whereas, in truth and in fact, such representations were untrue, alleging their falsity in detail, by means of which premises the said Wood falsely and fraudulently deceived him, and thereby the plaintiff has lost, not only the value of the consideration paid for the notes, but also $200, in a fruitless attempt to collect them.

Defendant pleaded the general issue. Wood died after the trial in the court below, and his administratrix has been substituted as defendant. The plaintiff had verdict and judgment in the Kent circuit court for $1,212.11.

It appears from the testimony of both plaintiff and Wood that their dealings first commenced in a trade between Wood's father, for whom he acted, and plaintiff about November 1, 1887. At this time plaintiff owned a block on West Bridge street, which he valued at $6,000, incumbered to the extent of $2,900. Abijah Wood, father of Isaac W., owned property on Livingston street, which, plaintiff claims, defendant valued at $4,500. This was incumbered by a mortgage of $2,500. Also property on Clinton street, which defendant, as plaintiff claims,

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valued at $1,500, upon which was a mortgage of $500. The parties traded even, each assuming the incumbrances upon the property received by him. The plaintiff testified that defendant told him that the mortgage of $2,500, which was then past due, and held by one Waters, could run as long as he wanted it to. On November 9, 1887, the defendant procured an assignment of this mortgage to himself, as he claims, at the request of plaintiff.

The testimony of the plaintiff tended to show that soon after this defendant came to him and asked him what he would take for the property received by plaintiff from Abijah Wood in the trade above referred to. After some negotiations the sum of $1,400 was agreed upon as the price to be paid plaintiff. The defendant thereupon offered him the notes above given and $200 in cash for the property. Represented to him that nothing had been paid on the Bradford note; that the amount due thereon for principal and interest was the sum of $900; that Mr. Bradford, the maker, was in business at Sparta, and was perfectly responsible; that the reason nothing had been paid on the note was that Bradford was good; and represented in regard to the Newaygo Manufacturing Company's note that the receiver had accepted the note, and had agreed to pay it in lumber, and had already made part payment thereof in that way, and that there was then due upon that note about $300; that these representations were all false; that the Bradford note had been all paid long before, excepting $100; that Bradford was not in business in Sparta, but had failed long before, and was wholly irresponsible financially; that the Newaygo Manufacturing Company's receiver had not accepted that company's note, nor agreed to pay it, nor paid any part of it, in lumber; that he believed these alleged representations to be true, and parted with his property in reliance upon them, and would not otherwise have done so; that

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he has attempted to collect the notes, and has wholly failed, and that they are wholly uncollectible; that defendant had knowledge of such attempts and failure, and for a long time afterwards recognized and acknowledged his continued liability to the plaintiff to make good to him the amount for which he took the notes; that both notes were wholly worthless because of the insolvency of the makers; that he did not know until the next day after he took the notes that the defendant had indorsed them, "Without recourse," and that when he discovered that fact he did not know the significance or effect of such indorsement.

The defendant testified that he made none of the representations claimed by plaintiff; that no price or sum was agreed upon for the property; that defendant was besought to buy the property by plaintiff, who was unable to pay the interest on the $2,500 mortgage. Defendant urged plaintiff to improve the property, and finally offered to assume the mortgages, and give him $200. Plaintiff asked him if he had not some notes he would give him,—

"Some notes you don't consider worth much. I shouldn't wonder if I could handle them."

Defendant then said to him that $200 was all the property was worth to save a foreclosure, and showed him the notes. Nothing was done at this time. Afterwards defendant went to see plaintiff about the payment of the interest, and then plaintiff wanted to see the notes. Plaintiff took a memorandum of them. Defendant told him that the $2,500 mortgage might lie, but he must have the interest. Plaintiff stated that he wanted to look up the notes, and the interview ended. About a week afterwards the plaintiff met defendant, and said:

"Wood, I will deed you the property; you give me the $200, and give me the notes."

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Defendant testified that he did not make much reply, because he did not really like to deal with him; but plaintiff seemed to think it was all right, and, as he started off, said he would make out the deed. That on the next morning, November 19, 1887, he came to defendant's home, with the deed executed, and the sale was made. That plaintiff knew that the notes were indorsed without recourse at the time the indorsement was made, and understood its import, and that it was expressly understood between them that defendant incurred no liability upon said notes in any event, and that plaintiff subsequently acknowledged that he had no claim against him on account of these notes.

He further gave testimony tending to show a full settlement of all the matters between them, including these notes. He testified that in April, 1888, the plaintiff desired him to purchase a building belonging to plaintiff's wife, and situated on land leased by plaintiff. That defendant had some talk with plaintiff's wife, and, on April 21, 1888, he bought the building, a store; that plaintiff told him the property was really his, but he did not want his creditors to get hold of it. He would not buy the store, or take the lease, until the plaintiff executed to him a full release of all demands against him, as he had heard that plaintiff was claiming that defendant owed him. He paid the plaintiff $225 in cash, and gave Mrs. Averill a bill of sale of flour and produce in payment. He introduced in evidence the assignment of the lease, containing also the release:

"GRAND RAPIDS, MICH., April 21, 1888.

"For a valuable consideration, I, Eugene F. Averill, of the city of Grand Rapids, Michigan, hereby transfer, sell, and set over unto Isaac W. Wood, of the same place, all my right, title, and interest in and to the annexed lease, made and executed by Reuben H. Smith to me, of the land and premises therein described, dated the 18th day of September, 1886.

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"And it is hereby expressly stipulated and agreed by the said Eugene F. Averill that there is nothing whatever due him from the said Isaac W. Wood by virtue of any past deal or transaction, whatsoever, and hereby states that no claim or demand of any amount is due, or has been due or claimed by him, the said Averill, against the said Isaac W. Wood, by virtue of the purchase by said Averill of a certain note of $600 executed by E. Bradford, and hereby represents and states that no liability exists, or ever existed, thereon, the said Bradford note, against said Wood, or will exist against him, said Wood.

"E. F. AVERILL."

At the same time he gave back to plaintiff, at his request, who dictated it, the following document:

"GRAND RAPIDS, MICH., April 21, 1888.

"I hereby agree that Eugene F. Averill is in no way or manner indebted to me, and that I will not commence suit or cause to be commenced on any claim or demand growing out of the sale or assignment to him of the E. Bradford note, so far as any claim is concerned for the recovery of money, or any other note sold to said Averill in the past in good faith.

"ISAAC W. WOOD.

"FRANK S. DONALDSON, Attorney."

Donaldson corroborates defendant as to this settlement, and the facts attending it. Donaldson swears that Averill was fully acquainted with the nature and contents of the document he was signing, and that Donaldson expressly informed him that if he signed it he could never expect to collect anything of Wood on account of these notes; that plaintiff said he did not claim that Wood was owing him anything on account of the notes, but still he did not want to sign it, and did not do so until it was read over to him several times, and fully explained to him. Then he wanted a receipt from Wood, and dictated it while Donaldson wrote it. Then he insisted upon the latter signing it as a witness, and underneath Wood's name.

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Plaintiff claimed in rebuttal that his signature to the release was procured by fraud. He testified that Donaldson said that there was no value received, and no consideration in regard to the release; and it was of no importance if he did sign it; that he told Wood that it was not right for him to sign it, and that he knew he owed him the sum called for by these notes. Wood said he knew that, but he wanted no trouble over the matter.

"The note shall never come to suit. If you will sign that paper I will make a satisfactory settlement with you."

Wood and Donaldson both told him that the paper,—the release,—was of no importance; that it was not binding at all; and that it was merely to satisfy Wood that plaintiff's wife might not claim the notes as hers, by assignment, or otherwise, from plaintiff, and for fear she would garnishee Wood, or refuse to give up possession of the building until they were paid. Plaintiff also testified that he meant the other paper to be a guaranty that Wood—

"Would not commence suit against me in regard to this note. That he would pay this money all nicely, and we would never have any trouble about the matter, and we would settle up."

That plaintiff wanted a paper—

"To show that I would not have to bring a suit against him; that was the idea; that he would settle it without my fetching any suit against him; that was the idea."

It is evident from the record that plaintiff is a very ignorant man as regards business matters, and it was the theory of his counsel that he was easily fooled and duped by Wood, a sharp business man. Wood and Donaldson deny making any such statements to plaintiff, or that any fraud was committed upon him. Plaintiff testifies that his wife made the bargain for the sale of the store

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property with Wood, and that he had nothing to do with it except to assign over the lease, which was worthless without the building, which was personal property, and resting on stilts upon the premises. That the property belonged to his wife, and he had no interest in it. That the money and property received of Wood all went to his wife. The bill of sale was made in her name, and the money paid to him he handed over to her. That after this transaction Wood agreed to settle with him for the notes. In this he is corroborated by another witness.

There are 28 assignments of error, all of which are relied upon. We shall notice those we deem worthy of discussion.

It is alleged that the court erred in permitting plaintiff to testify that Wood told him that the receiver of the Newaygo Manufacturing Company had accepted the note, because there is no allegation to this effect in the declaration. The declaration averred that Wood represented that he had made an arrangement with such receiver to pay the note in lumber. Such an arrangement, we think, would be a virtual acceptance of the note to the common understanding.

The defendant's counsel also objected to the giving of this arrangement in evidence, for the reason that there was no allegation in the declaration that Wood's contract with the receiver was transferred, or to be transferred, to plaintiff. No such allegation was necessary. Also, for the further reason that the receiver had no power to make any such arrangement with Wood, and, as the plaintiff must be presumed to know the law, he could not have placed any reliance upon such statement. The plaintiff was not debarred from relying upon Wood's statement that this arrangement existed because of any lack of authority under the law in the receiver to make it. To hold that a man cannot be defrauded by false

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representations because he is presumed to know the law, which presumption is a violent one in most cases, would be to place the ignorant and foolish, the persons who are generally the victims of fraud, beyond the protection of the law. It was also proper for the plaintiff to state that he relied upon these representations in taking these notes.

In detailing the conversation between himself and Wood at the time the alleged representations were made, plaintiff was permitted to state, against objection, that Wood said he would guarantee that the notes would be paid, or that he would see that they were paid. This is assigned as error. The testimony was admissible as a part of the transaction, and its admission did not prejudice defendant except in a lawful way. No claim was made upon the trial for any recovery by reason of this guaranty. The court instructed the jury in reference to it that these promises to guarantee the payment of the notes would not support this action, which was for fraud, and that the testimony of such promises could not be considered at all in the case unless the jury found that the alleged fraudulent representations were made, and that the promises were made to aid in the fraud. This was correct. If there was no fraud, the case against defendant was ended. If the jury found that the fraud was committed as alleged by plaintiff, they had the right to all that was said and done by the parties at the time the notes were transferred.

Error is assigned upon a remark of the circuit judge during the trial. No exception was made at the time, and it does not appear that the attention of the court was ever challenged to it. Nor do we think the remark was prejudicial to defendant. The trial court was speaking in relation to the claim of defendant that parol proof could not be introduced that Wood would see the note

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paid when the note itself was indorsed by Wood, "without recourse," which was his written contract, and in effect relieved him of all legal responsibility, or that it could not be shown what Wood said when he was making the indorsements on the company note. The court said:

"The agreements these parties were making were in reference to the sale of real estate, and the defendant's representations of warranty related to the consideration that the defendant was to pay for this real estate, a note, turning out that note which, it is claimed, he represented to be good and collectible, and indorsed in this particular way. Now, the question is whether that excludes the testimony of parol representations alleged to have been false, and the warranty of the collectibility or validity of the note, and the other representations. Now, if he had indorsed that note in the ordinary way he would have been liable for the full amount."

Defendant's counsel remarks:

"Liable in *assumpsit* for the indorsement."

The court says:

"Instead of indorsing it in that way, he indorsed it in such a way as to render him not liable upon it, and induces the parties to take it upon representations that of itself it is collectible without his indorsement. What is the rule that precludes them from relying on the representations of warranty? What proof do I understand, Mr. Ward, that you intend to make in that connection?"

Plaintiff's counsel answered that he intended to show what Wood said when he was making indorsements upon the note of payments he had received from the receiver of the Newaygo Company, and not anything in reference to the indorsement, "without recourse," which plaintiff did not know he made until afterwards.

The court evidently misunderstood the objection of defendant's counsel, and was supposing the case whether,

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if defendant did indorse the note, "without recourse," and induced the party to take it upon representations that it was good without his indorsement, such representations could be proved. He did not intend to state that the defendant did induce the plaintiff to so take it, and we cannot infer that the jury so understood it.

The charge of the court to the jury was remarkably clear and fair, and we can find no fault with it. In relation to the release the court said:

"A paper has been put in evidence on this trial, called a 'release.' It is a written declaration by the plaintiff that at the date thereof, April 21, 1888, there was nothing whatever due to him from the defendant by virtue of any past deal or transaction whatever. The language is plain and intelligible, and its meaning and effect could not be misunderstood by any person of ordinary intelligence, and unless the plaintiff was induced to sign it by the fraud of the defendant, or it was wholly without consideration, it is binding upon the plaintiff, and he cannot recover if he signed the paper deliberately, with full knowledge of its contents, or not under the influence of any mistake. If it was induced by fraud, or was wholly without consideration, then it is not binding. The law approves of settlements and compromises of disputed claims, and, when deliberately made, the parties are bound by them. The law upholds and sustains them, and will not disturb them, or sanction any interference with them, without the consent of the parties to them, except upon the ground of fraud or mistake.

"If you find that the plaintiff desired the defendant to buy the property from Mrs. Averill that was conveyed by the bill of sale which was delivered at the same time as the assignment of the lease containing this release was delivered, and that the defendant would not make that deal unless the plaintiff would sign such a release or declaration, and the plaintiff signed it in order to have that sale of his wife's property consummated, that would be a sufficient consideration for the release, and no promise by the defendant made at the time or subsequently to pay plaintiff, if any such promise was made, can be of any avail to plaintiff in this suit, or relieve him from the

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binding effect of the settlement. The consideration for the release need not pass to the plaintiff. It is just as binding upon him if the consideration is paid to his wife, if it was a part of the same transaction. The release can only be avoided in case the defendant and his attorney deceived plaintiff as to its contents and effect, and thereby induced him to sign it."

This instruction was correct, and covered the case in respect to the release.

It is contended that the plaintiff could not retain the consideration money, flour, and other produce received upon the last trade, and repudiate for fraud the release then and there executed by him; that as long as he kept the fruits of the bargain he could not relieve himself of the effect and tenor of the release. But it must be remembered that the plaintiff's theory and testimony was that he had nothing to do with this trade except to assign over a lease which was worthless without the building, and for which he received no consideration; that the store belonged absolutely to his wife, and that she made the trade, and received every cent of the consideration for the same; that he was induced to sign this release by the fraudulent representations that it was not binding, and would not be used against him. If this theory was correct, and his testimony true, he received no benefits from the transaction, and had nothing in his hands or under his control to return to the defendant, and he was therefore not estopped from asserting the fraud upon him.

One cannot read this record without being satisfied that the plaintiff is a man but little versed in business matters, and one who might easily be imposed upon and defrauded. The matter was fairly submitted to the jury, who found in his favor, as we think, justly. We have carefully examined all the errors assigned, and find nothing occurring upon the trial prejudicial to the defendant, except in so far as the law and the testimony militated

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against his theory of the transactions between him and the plaintiff.

The judgment is affirmed, with costs.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

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MAY CANFIELD v. THE CHICAGO & WEST MICHIGAN RAILWAY CO.

Negligence—Pleadings and proof—Variance—Sufficiency of declaration.

1. Where the icy condition of a walk upon which plaintiff fell and sustained injuries, for which she sues, was not the result of neglect to remove naturally-accruing ice and snow, but was caused by the action of the defendant in throwing water on the place where it froze, the case is a proper one for the jury.
2. In this case, it is held that there is no variance at all between the case charged and the case made, which distinguishes it from *Wilkinson v. Spring Works*, 78 Mich. 405, where the declaration charged that a particular ailment was *produced* by the accident, and the Court held that the plaintiff was confined in his recovery to the scope of his allegations and proof.

Error to Berrien. (O'Hara, J.) Submitted on briefs November 13, 1889. Decided December 28, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin (L. C. Fyfe, of counsel), for appellant.

N. A. Hamilton, for plaintiff.

[The points of counsel are stated in the opinion, with the authorities cited.—REPORTER.]

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CAMPBELL, J. Plaintiff, a young woman of about 22, fell on the ice on a sidewalk near the defendant's water-tank, in the village of St. Joseph, and claims to have received injuries, for which she recovered damages in the circuit court of Berrien county. The declaration sets out that she,—

"By said fall, was greatly injured, to wit, her head, shoulder, and side were severely cut and bruised, her collar-bone was broken, and she received permanent injuries, and her health was and is permanently injured; and by reason of which injuries the plaintiff became and is, and for a long time will be, lame and sick, and has suffered great bodily pain, and has been disabled from attending to her business for six months and more, and incurred an expense of $200 for medical attendance and nursing," etc.

Both counts are substantially alike in regard to statement of damage. The testimony showed that defendant had a stand-pipe, with an arm swinging round, to supply the locomotives; that this arm swung so as to let water fall upon the sidewalk, where it froze, making very slippery ice; that on the morning of January 25, 1888, plaintiff was found, a few minutes after 6 in the morning, lying insensible at or near this place, which is near the bottom of a slope, by Mr. Squibs, who was going to his work at the knitting-works, where plaintiff was also employed; that he fell twice, within ten feet, in going up to her; that he and two young women of her acquaintance restored her to consciousness, and on recovering consciousness she made an exclamation of suffering; that this was the only slippery place on the way to the works. They aided her to walk home. From plaintiff's account, she fell very shortly before she was found. Her testimony indicates that the injury chiefly affected her right arm and shoulder, and was continuously painful, and thereby interfered with the free use of the arm.

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There was medical testimony indicating an injury to the collar-bone, and to the shoulder. Examinations were made at different times, and the medical witnesses for plaintiff and defendant did not agree upon the appearance of the collar-bone and shoulder. The medical witness for defendant claimed there were no signs of any permanent mischief, and differed in some of his medical opinions. There was testimony concerning the condition and work of plaintiff before and after. There was also some testimony that after a sickness, when she was a child, plaintiff was weak in mind and body, and especially in her right arm, which they intimated was paralyzed. There was no testimony of present mental weakness or paralysis; and the medical testimony all bore on the local conditions of the shoulder and the adjacent parts, and the presence of pain in moving the arm, and the effect on the muscles of strains and other local injuries. All agreed that there was no withering or shrinking of the arm, and the defendant's medical witness testified that the arm was in normal shape and appearance.

Only two errors are relied on here. One is that plaintiff made no case to go to the jury. The other is that the declaration is insufficient in one phase of the case which defendant asked to have laid before the jury. As the icy condition of the walk was not the result of neglect to remove naturally-accruing ice and snow, but was caused by the action of defendant in throwing water on the place where it froze, we think the case was a proper one for the jury. There is no proof that plaintiff was in fault in going where she went.

The other assignment is for the refusal of the court to give a specific charge. There is no error assigned on any charge actually given. The court actually charged the jury on the point involved in this manner:

"If you shall find that the physical condition of this

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plaintiff had been impaired before the time of the alleged injury, or if she was not in perfect health, and in the full, free, and unimpaired use of her arm and shoulder, or, in other words, if she was not in perfect physical condition at the time of the alleged injury, then, gentlemen, you must closely scrutinize the testimony bearing upon her after and present, as well as her prospective, physical condition; and if her past or present condition, or prospective condition, should or shall be owing in whole or in part to such prior condition, then, gentlemen, there can be no recovery for either pain, suffering, or loss of time so occasioned by such former physical condition, or any of its natural results."

Further instructions were carefully given, to the same effect, as to discriminations. The request made before the charge, and refused, except so far as covered by what is above referred to, was this:

"The defendant has given evidence which tended to prove that the plaintiff, when a child, suffered severe illness, and that illness left her right arm disabled and infirm; and its theory is that the disability with which the plaintiff has suffered since the accident in question was not caused by the accident. If the jury believe from the evidence that the plaintiff's right arm and shoulder were weak and disabled before the accident in question, and as the result of said sickness, then she cannot recover, under the declaration and evidence in this cause, for such disability, or any aggravation of the same produced by the accident in question."

This request is supposed to be sustained by the opinion in *Wilkinson v. Spring Works*, 73 Mich. 405 (41 N. W. Rep. 490). In that case the principal damage alleged to plaintiff was that by the injury complained of, which was the fall of part of a roof, his brain was injured, his body paralyzed, and his internal organs so injured that he has been paralyzed and subject to fits. There were allegations of other bodily sufferings, which it was not disputed were properly charged and proved. The only questions leading to comment were concerning epilepsy and paralysis. The court allowed the jury, there being

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proof of previous epilepsy and paralysis, to give damages for the aggravation of both. This Court held that the declaration fairly alleged the paralysis and epilepsy to have been caused, and not merely aggravated, by the injury, and that this was such a variance as would prevent recovery for those causes.

We cannot see the pertinency of this objection. The proof in the present case showed the injury exactly as described; and the declaration claimed, and the proof showed, nothing more than was to be gathered from that injury. The declaration did not directly or inferentially set up any state of things inconsistent with the proofs relied on. There is no necessary inference that the plaintiff, before the injury, was robust or weak, sound or unsound. There was no direct proof in the case that at the time of this accident plaintiff was paralyzed or afflicted with any permanent defect or injury due to such paralysis, and not caused by the accident. The medical testimony, which, on such a subject, is the only safe reliance, is harmonious on both sides on this point, and contradicts any such inference. Paralysis and epilepsey are permanent and increasing disorders, which, if caused by the accident in question in the *Wilkinson Case*, would have been the entire ruin of the plaintiff, due to defendant's wrong. If the injury did not produce them, it would entirely change the main issue.

The declaration in the present case charges an abnormal change of condition, but no more than might happen from any serious injury to the upper shoulder and arm of a sick or well person. In such an issue it is a mere matter of degree and extent, and such a question as must always be applied with reference to existing conditions. The testimony set up here in the request had no tendency to deny any of the actual injuries relied on, whereas in the *Wilkinson Case* it changed the issue entirely as to the

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principal damage. There is no variance at all between the case charged and the case made, and there is no rule of law which will prevent a plaintiff from recovering whatever pertinent testimony shows she ought to recover.

The judgment should be affirmed, with costs.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred with CAMPBELL, J.

CHAMPLIN, J., (*dissenting*). In this case the plaintiff's right of recovery depends upon the facts alleged in her declaration, and put in issue by the plea. She alleges that she was passing along a sidewalk in a public street, and stepped upon some ice caused by water escaping from defendant's tank and pipe, whereby the place was made slippery, and she slipped and fell upon the sidewalk and ice, and by said fall was greatly injured; that her head, shoulder, and side were severely cut and bruised, her collar-bone was broken, and she received permanent injuries, and her health was and is permanently injured; and by reason of which injuries the plaintiff became, and is, and for a long time will be, lame and sick, and has suffered great bodily pain, and has been disabled from attending to her business for six months and more, and incurred an expense for medical attendance and nursing of $200.

There is no count in the declaration alleging that she was at the time afflicted with any disease, malady, or infirmity whatever which the injury she received from her fall tended to aggravate or make worse; but, on the contrary, whatever her injuries were, they were caused by the fall she got through the defendant's negligence. The testimony introduced by her was exclusively directed to sustain the issue so made by her. The defendant, by a cross-examination of the plaintiff's own witnesses, and by other positive and direct testimony, introduced evidence

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which tended to show that the injury complained of, and the effect which the plaintiff claimed was produced solely by her fall upon the sidewalk, had existed for a long time prior to the accident; and, based upon this testimony, counsel for defendant requested the court to instruct the jury as follows:

"The defendant has given evidence which tended to prove that the plaintiff, when a child, suffered severe illness, and that illness left her right arm disabled and infirm; and its theory is that the disability with which the plaintiff has suffered since the accident in question was not caused by the accident. If the jury believe from the evidence that the plaintiff's right arm and shoulder were weak and disabled before the accident in question, and as the result of said sickness, then she cannot recover, under the declaration and evidence in this cause, for such disability, or any aggravation of the same produced by the accident in question."

The court refused to give this request, and counsel for defendant excepted.

Under the declaration, the testimony, and the theory of the defendant, I think the latter part of this request should have been given. It would not have been proper for the court to instruct the jury that the defendant had "given evidence which tended to prove" certain facts. But the testimony was introduced for the purpose of proving, and which, if believed, tended to prove, certain facts. The issue and the testimony, however, fairly called upon the court to instruct the jury that, if they found from the testimony that the plaintiff, prior to the time of her falling upon the sidewalk, had, as the result of physical infirmity, a weak shoulder and arm, which she now claims was caused by her fall, she could not recover, under her declaration, damages resulting from such existing infirmity, nor for any aggravation of an existing infirmity resulting from her falling upon the sidewalk at the time, place, and under the circumstances, stated in

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her declaration. He did instruct them that she could not recover any damages resulting from existing infirmities, and only such damages—

"As was, is, or will be the natural and direct result of the accident, aside from her past condition."

This would authorize the jury to include damages for aggravation of existing infirmities. We have held that the plaintiff must be confined to the cause and consequences alleged in the declaration. *Thurstin v. Luce*, 61 Mich. 292 (28 N. W. Rep. 103); *Wilkinson v. Spring Works*, 73 Id. 405. And where it is developed upon the trial that the infirmity alleged might, if the testimony be believed, have existed prior to the alleged cause, and no claim is made in the declaration that the malady was aggravated by the accident, the defendant is entitled to an instruction that damages for the aggravation of existing physical infirmities cannot be recovered in the action.

For the error pointed out, I think the judgment should be reversed, and a new trial ordered.

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CLARENCE M. BURTON v. THOMAS P. TUITE.

Public records and files—Right of the public to examine—Dealers in information—Public character of city tax records.

1. Sales-books kept by the receiver of taxes, containing a statement of the sale of delinquent tax lands, and by him turned over to the city treasurer, who minutes therein redemptions or sales of city bids, are public records within the meaning of Act No. 205, Laws of 1889, providing for the inspection of records and files in public offices.

2. A city can have no private books, not even of accounts, not open to the inspection of its citizens. Its doings, and the

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doings of its officers, and the records and files in their offices, must be open to the public; nor can fees be charged for such inspection to those having the right to examine and inspect such files and records.

8. The Legislature intended to assert, by Act No. 205, Laws of 1889, the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances.

Mandamus. Submitted October 25, 1889. Granted December 28, 1889.[1]

Relator applied for *mandamus* to compel respondent, as city treasurer, to allow him to examine, and have access to, certain records in said treasurer's office. The facts are stated in the opinion.

Henry A. Chaney (*Hoyt Post*, of counsel), for relator.

John W. McGrath (*E. Minock*, of counsel), for respondent.

MORSE, J. The relator asks for the writ of *mandamus* to compel the respondent to permit him to inspect and examine the records and files in the city treasurer's office at Detroit, and to furnish proper and reasonable facilities for such inspection and examination, and for making memoranda and transcripts from such files and records, in compliance with Act No. 205, Laws of 1889. The act in question reads as follows:

"That the officers having the custody of any county, city, or town records in this State shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom,

[1] Respondent was afterwards adjudged guilty of contempt of this Court, by disobedience of its writ of *mandamus*, and fined. See *Burton v. Tuite*, 45 N. W. Rep. 88.

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during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose: *Provided,* that the custodian of said records and files may make such reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of such officer: *And provided, further,* that such officer shall prohibit the use of pen and ink in making copies or notes of records and files."

Relator shows in his petition that he is engaged in the abstract business in the city of Detroit, and has invested a large sum of money in said business. That his business requires that he should know what taxes, levied by the city of Detroit, are liens upon property of which he is furnishing abstracts, and by whom such liens, if any, are held. That when lands are sold for unpaid taxes the sale is conducted by the receiver of taxes. A statement of such sales in book form is made by the receiver, and turned over to the city treasurer, in whose custody it thereafter remains. When sales are redeemed or city bids sold, such redemption or sale is minuted in this book. That it is necessary in said relator's business to frequently consult this book. If proper facilities were granted him, he would not need to consult the same more than 10 minutes in any one day. That the prevailing rule and custom is, in all the city and county offices, to permit all persons to have free access to the records therein, and he himself has ordinarily been allowed this privilege without obstruction or restraint, except in the case of the respondent, who is city treasurer of the city of Detroit.

That said respondent has frequently refused to permit your relator to inspect the sales-book above referred to, as have also his subordinates; and, if at times an inspection of such records has been granted, it has always been accompanied with insulting language, implying that relator

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was taking time which belonged to the public, and that he must hurry, or that the books would be taken from him; and this, too, although no other parties were present to be waited upon or attended to, and though much more time was consumed by said treasurer in making such complaints than would be necessary for relator to inspect and make such memoranda as he needed if he could have access to the records without unreasonable interruption. A clerk would be detailed to see that the relator did not mutilate the records, with instructions not to permit relator to take the books. But more frequently relator has been told by said city treasurer and his subordinates that he could not see the records. Respondent has followed this obstructive course for a long time, to the great annoyance and discomfort of relator, and in face of the fact that there was posted in his office a notice to the effect that all information desired by the public would be promptly and cheerfully furnished. That respondent at one time informed relator that it was a matter of money with him, and that, if relator would pay him $25 per month, relator could have what access he pleased to the records in said treasurer's office.

July 2, 1889, relator called at the treasurer's office, at about 11 o'clock A. M., and requested the privilege of inspecting some of the sales-books. Respondent asked if the information wanted was for relator's private business. Relator replied that Richard M. Coon was the owner of lot 24, in Wesson's section of the Thompson farm, in the city of Detroit, and that he had employed relator to see if certain tax sales which had been previously made were still held by the city or disposed of, and, if disposed of, to whom. Respondent requested relator to write out what he wanted on a piece of paper, which he did. The paper was handed to a clerk, who was called

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by respondent to wait on relator. The parcel of land had been sold for six successive years, and it became necessary to inspect six different sales-books. That the statement which relator had made for the clerk, a copy of which he retained, informed the clerk the number of the book required, the page of the book, and the line on the page which he desired to inspect. That said clerk produced four of the books required, and they were hastily inspected by relator, but he was not permitted to handle them. During the examination, which could hardly have occupied ten minutes, respondent himself sat by, discussing the general subject of relator's rights, and apparently in no wise hurried by the pressure of official duties. That, after relator had inspected the fourth volume, said clerk,—taking his cue from the language and actions of his employer, said respondent,—abruptly, violently, and unreasonably refused to produce the other two books requested, and left the room. That relator then asked the city treasurer himself to produce the two books asked for, but said treasurer refused. Relator then told respondent that he would get the books himself if he (respondent) would permit him (relator) to go into the room where said books were, for that purpose. Respondent told him he could not go into that room, and absolutely refused to permit him to see the books he desired. Relator offered respondent ten dollars per month to be accorded such treatment as is accorded to the public. Respondent refused the offer. Relator then formally demanded the right to inspect the two books he had asked for before, and reminded respondent of the statute. Relator said that if he could not see the books he should ask for a *mandamus*. Respondent told relator to "mandam" if he wanted to; that the books were in the vault, and relator could not see them; and that nothing but an order from the common council would make him remove

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them. He told relator to leave a written memorandum of what he wanted, and relator refused to do this, as he had already furnished respondent with one statement of what he required. Respondent became vociferous, declared that he had disposed of the subject, refused to hear anything further, and left the room.

Relator then, under advice of counsel, made a new memorandum of what he wanted, and offered it to the deputy treasurer, who said he had no time to attend to it. Relator told him he need not attend to it then, as he would send his clerk for it; laid the memorandum on the table, and placed a paper-weight upon it. Respondent came in about then, in a high temper, and with some profanity ordered the relator out of the office, which order relator obeyed. During the whole time of this interview there was no other person in the office on business, unless he was secluded in the private office of respondent.

The respondent in his answer denies that the books referred to by relator are public records, or that they are made so by charter, ordinance, or law, or that they are required by law to be kept, or that relator, or any person except respondent, is entitled to the possession of said books or entitled to take them out of the custody of respondent, or to make extracts from them, except under the immediate supervision of respondent. He denies that it is the universal practice in city offices to permit all persons desiring to inspect the said books to have free access to them, or that such is the usage, or that such usage has become so well established as to have the force of a common-law custom. He denies that relator has been ordinarily allowed to inspect such books, without obstruction or restraint, if by obstruction or restraint is meant a denial of the right of access to said books without the supervision of the city treasurer. He denies that

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the right which relator seeks to establish is recognized or confirmed by any act of the Legislature. He denies that at any time this respondent, or, by this respondent's direction or authority, any deputy or clerk in respondent's office, has accompanied any inspection of the books which relator has been allowed to make with insulting language. He denies that relator has been told by respondent that he (the relator) could not see the records. He denies that respondent has been guilty of obstructing relator. He denies that respondent derives an income from abstracts amounting to $1,000 per annum, or any such sum. He denies that this respondent has ever said that if relator would pay respondent $25 per month during his term of office the relator could have whatever access he desired to the books in respondent's office. He denies that he made use of the expression found on page 9 of relator's petition, viz.: "God damn quick, too."

Respondent also sets forth in his answer that relator is seeking the information from the books as a matter of merchandise to sell to others. That up to July 1, 1884, abstracts could only be procured of the city treasurer, and that the treasurer whose office expired in 1884, realized from $1,500 to $2,000 annually from tax abstracts, and that he is informed relator paid such officer for the privilege of making a copy of the books of said office, and did make and use the same for private gain. That for one year prior to July 1, 1888, relator paid $35 per month for this privilege. That respondent has always been ready and willing to give any lot-owner or citizen desiring it information as to tax charges upon lands, and has always done so free of charge. Insists that he has legal right to charge a small fee for making out abstracts, as there is no law requiring him to make them otherwise.

That the books in question have been kept for the information and convenience of the city of Detroit, and

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are not required to be kept by the city charter or any law or ordinance. That each year, after the receiver of taxes makes sale of lands for unpaid taxes, one of said books is made up by such receiver, and entered therein is the name of the owner, if known, a description of each parcel of land, the amount of the city tax, school tax, etc., the total tax, the name of the person to whom sold, which is usually the city of Detroit; and said books also contain blanks for entry of assignment or redemption. There are in all 37 books, containing from 100 to 250 pages each. In addition, there are some sales-books, containing memoranda of sales for unpaid special assessments. There are also 16, one for each ward, indexes to sales-books, each of which contains a description of each parcel of land in that ward, with a column for each year in which to enter, if sold, the number of the page of the sales-book for that year containing the memoranda of the sale. If a sale has been canceled, a red ink line is drawn through the reference figures. That the books so kept are easily subject to alteration or defacement. That the books aforesaid are valuable, and the loss of the same, or any of the same, would be irreparable. That respondent is charged by the city with the care and custody of the same. That a portion of respondent's office is kept for the use of the public, and the public is necessarily, by means of desks, railings, and wire-work partitions, excluded from the private or working department of the office, and from the part containing the moneys, books, and papers in respondent's office. That relator, in order to use the right which he here seeks to establish, must necessarily be admitted to that portion of respondent's office from which the general public is excluded. That the books referred to are kept by respondent in a vault in the city treasurer's office, and in the same vault are other valuable books and papers, together with large

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sums of the city moneys, varying in amount from $100 to $30,000. That to produce said books, and a number of them, as is often required by relator, requires a large amount of time almost daily, and from 10 to 30 minutes per day have often been consumed in so doing. That respondent insists that it is the duty of respondent, in order to protect himself and his bondsmen, to keep their books under the immediate care, custody, and supervision of himself, or one of his trusted employés. That during the month of July relator's purpose is not so much to look after individual cases of sales, as it is to compare his minutes of sale with the office memoranda of the same.

Respondent submits that he is not obliged to produce the books of his office, and supervise the inspection of the same, to one who is collecting information for merchandise, and that, if he does do so, he is entitled to pay for it. He also submits that in other public offices,—in the office of register of deeds, in the probate court, and in the county clerk's office,—when information is furnished which the law does not require to be furnished, charges are made, and legitimately, for such information. He also shows that he has given bond for the safe-keeping of these records. That his total fees for abstracts for 11 months ending December 31, 1888, were but $243. And he finally submits that relator is not entitled to access to the books of respondent's office at his own pleasure, neither is he entitled to frequent or enter into that portion of respondent's office from which the general public is excluded. That respondent is entitled to supervise the examination of the books in his office, and that the relator, as a dealer in information, is not entitled to compel respondent to give his time to relator, at the pleasure of relator, for his gain, and without compensation to respondent.

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It is evident, from the petition and answer, that there is more or less of ill feeling between these parties, and it is also clear that the relator has been in fact denied free access to these sales-books, and that the respondent does not propose to permit such access unless he is paid therefor; nor does he propose to furnish any facilities, reasonable or otherwise, to the relator to inspect and examine said books without pay.

This right of relator, claimed under the statute, is denied, first, on the ground that these books are not public records, because there is no express statutory provision anywhere that such books shall be kept. These books are made up in the first place by the receiver of taxes, and by him handed over to the city treasurer. They are therefore books used and kept in two of the public offices in the city of Detroit, and they must be considered public records. The claim that they are private books of account is absurd. They are neither the private books of the receiver of taxes or of the city treasurer, and the city of Detroit, a public municipal corporation, can have no private books, not even of accounts, not open to the inspection of its citizens. Its doings, and the doings of its officers, and the records and files in their offices, must be open to the public; nor can fees be charged for such inspection to those having the right to examine and inspect such files and records.

But the broad ground is also taken that the relator has no lawful right to inspect these sales-books, without recompense to the respondent, because he is an abstract maker, and his business may be, and is in most cases, to sell some person the information gained by such examination; that he does not come under the statute, because he does not have "occasion to make examination of them for a *lawful* purpose," and that this case is covered and against relator by two former decisions of this Court:

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Webber v. Townley, 43 Mich. 534 (5 N. W. Rep. 971); *Diamond Match Co. v. Powers*, 51 Id. 145 (16 N. W. Rep. 314).

If I understand the latter case, the writ of *mandamus* was denied because the Diamond Match Company was not a citizen, nor an inhabitant, nor even a domestic corporation. It did not show its charter, nor give any evidence of its powers or artificial capabilities. This Court say:

"We have no means of knowing that it has capacity to buy or hold lands or deal in titles anywhere, or to carry on the business in which its petition alleges it to be engaged, or to apply itself to such an enterprise as making a system of abstracts of all the titles of all the real property in a county. The case is bare of information in regard to the true legal *status* of the relator, and as to whether it is other than a mere intruder in what it now demands."

The petition of the relator alleged that it was incorporated under the laws of the state of Delaware; that it had become the purchaser of about 30,000 acres of pine land in the county of Ontonagon, had erected extensive saw-mills, and invested nearly $200,000, and was cutting large quantities of pine, and constantly purchasing more land; and, to provide against acquiring defective titles, desired to protect its rights and interests by providing for itself an abstract of all the lands in the county. The relator was permitted opportunity to examine and make abstracts, as far as its own ownership or interests was concerned, present or prospective; but the dispute was whether it had the right to go further, and insist on having office accommodations, and the handling of all the records, to make an abstract of title to all the lands in the county. While the writer of the opinion, Chief Justice GRAVES, paused to make some practical suggestions of obstacles in the way of proper relief being afforded by *mandamus*, the ground of the denial of the writ was that

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the relator had failed to show any title to the right it claimed, because the authority given to it by the state by which it was created was not disclosed, and could not be assumed. See *Diamond Match Co. v. Powers,* 51 Mich. 147, 148.

In this view of the case above cited, I do not think that it is any authority bearing against the relator's claim in this case. And I cannot agree with the opinion of this Court, or the reasons given for it, in *Webber v. Townley, supra;* nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur, if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and "sufficient unto the day is the evil thereof." I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for the purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office, and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread.

Upon what different footing can an abstractor—can

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Mr. Burton—be placed, within the law, without giving a privilege to one man or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for a compensation. In such business it is necessary for him to consult and make memoranda of the contents of these books. His business is a *lawful* one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? If he is shut out because he uses his information for private gain, how will it be with the dealer in real estate, who examines the records before he buys or sells, and buys or sells for private gain? Any holding that shuts out Mr. Burton from the inspection of these records for this reason, also shuts out every other person except the buyer, seller, or holder of a particular lot of land, or one having a lien upon it, or an agent of one of them, acting as such agent without fee or reward. It cannot be inferred that the Legislature intended that this statute should apply only to a particular class of persons, as, for instance, those only who are interested in a particular piece of land. "Any person" means all persons.

I can see no danger of great abuses or inconveniences likely to arise from the right to inspect, examine, or make note of public records, even if such right be granted to those who get their living by selling the information thus gained. The inconvenience to the office is guarded against by the statute, which authorizes the incumbent to make reasonable rules and regulations with reference to the inspection. And when abuses are shown there will no doubt be found by the Legislature or the courts a remedy for them. It is plain to me that the Legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of

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the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. The respondent in this case is the lawful custodian of these sales-books, and is responsible for their safe-keeping, and he may make and enforce proper regulations, consistent with the public right, for the use of them.

"But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to and examination and inspection thereof at proper seasons." *Lum v. McCarty, infra.*

It follows that he has no right to demand any fee or compensation for the privilege of access to the records, or for any examination thereof not made by himself or his clerks or deputies. He has no exclusive right to search the records against any other citizen. *Lum v. McCarty,* 39 N. J. Law, 287; *Boylan v. Warren,* 39 Kan. 301 (18 Pac. Rep. 174); *State v. Rachac,* 37 Minn. 372 (35 N. W. Rep. 7); *People v. Richards,* 99 N. Y. 620 (1 N. E. Rep. 258); *Hanson v. Eichstaedt,* 69 Wis. 538 (35 N. W. Rep. 30.[1])

It follows, in my opinion, that the prayer of the petitioner must be granted, and the writ issue as prayed, the relator asking in this writ no more than the statute gives him.

CHAMPLIN, J., concurred with MORSE, J.

CAMPBELL, J. I think relator has such an interest as entitles him, under the Laws of 1889; to see the book in question, and confine my opinion to that point.

SHERWOOD, C. J., and LONG, J., did not sit.

[1] Cited by relator's counsel.

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WILLIAM C. HILL v. ABRAM MATHEWS.

Contract—Construction—Lack of complete performance by plaintiff —Assumpsit—General issue—Election—Laches.

Plaintiff transferred to defendant certain land warrants, at $20 per acre, and agreed to use his whole influence and legal ability in securing the location of certain lands thereunder, the application for such entries being contested in the General Land Office, at Washington. In consideration of such services, if successful, he was to receive a deed of an undivided one-eighth interest in the lands when patented to defendant, and if unsuccessful was to receive back the warrants sold defendant, if he so elected, at the same price he sold them for. The contract further provided that a failure to secure patents for the lands should estop plaintiff from demanding compensation for his services in trying to procure such patents. The applications were rejected in April, 1886, and in December, 1886, the defendant sold the warrants at $55 per acre. In July, 1887, plaintiff made a formal demand for the warrants, and a tender of the $20 per acre was waived, and the demand refused, whereupon plaintiff brought suit upon the contract, counting upon the failure of the defendant to return the warrants, at $20 per acre, and recovered a judgment for $35 per acre, the trial court holding the contract *divisible*, and that the delay of the plaintiff to make an election under the contract to receive the scrip was excused by the action of the defendant in disposing of the warrants. In reversing the judgment the Court hold:

1. The contract must be construed as a whole, and the services of the plaintiff in procuring the location of the land were a condition precedent to the return of the warrants.

2. The title to the warrants passed to the defendant when he made his purchase, and his contract for a resale is executory; and when a promise rests upon two things to be performed for its consideration, and the promisee desires to enforce it, he can only do so after such performance.

3. From the facts disclosed in the testimony, there was a question as to what services plaintiff rendered for the defendant before the land department that should have been submitted to the jury.

4. Assuming the Commissioner of the Land Office to be the highest

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authority having jurisdiction in the matter, the plaintiff should have made his election *at once*, and notified the defendant; and a fair construction of the contract required such election and notice to have been made and given within a very few days, at most, after the decision of the Commissioner.

5. It was of no consequence what defendant had done with the warrants; he should have had an opportunity to have returned them, or to have replaced them with other like scrip.

Error to Marquette. (Grant, J.) Argued October 29, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

F. O. Clark, for appellant, contended:

1. In support of the claim that evidence of the non-performance of the contract by the plaintiff was admissible under the general issue, and that such non-performance was a complete defense to plaintiff's claim, counsel cited: *Allen v. McKibben*, 5 Mich. 454; *Ingalls v. Eaton*, 25 Id. 32; *Wilson v. Wagar*, 26 Id. 462; *Platt v. Brand*, Id. 175; *Stewart v. Ashley*, 34 Id. 183; *Peck v. Houghtaling*, 35 Id. 127; *Berringer v. Iron Co.*, 41 Id. 305.

2. The universal rule of construction of contracts is that they shall be read and construed together in all of their parts, and so construed as to express the intention of the parties as discovered from all of such portions; citing *Knower v. Emerson*, 9 Pick. 422; *Haywood v. Perrin*, 10 Id. 230; *Gray v. Clark*, 11 Ver. 583; *Harlow v. Iron Co.*, 36 Mich. 105, 117.

A. B. Eldredge, for plaintiff, cited no authorities.

SHERWOOD, C. J. This action is in *assumpsit*, brought by the plaintiff to recover damages of the defendant for his alleged violation of a written contract, dated March 21, 1882.

The plaintiff is a Washington lawyer, residing in the District of Columbia. The defendant resides at Marquette, Michigan. The latter, at the date aforesaid, wished to procure some Porterfield land-warrants with

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which to make entry of certain lands at the Marquette land-office, and also desired to obtain the services of the plaintiff, in connection with said entries, in the contest that was expected to arise upon appeal from the register and receiver of the Marquette land-office to the General Land-office at Washington; and the contract entered into between the parties provides that—

"Whereas, certain professional services will be required in the General Land-office at Washington, it is hereby agreed between the said Abram Mathews and W. C. Hill, of Washington, D. C., that in consideration of said W. C. Hill having furnished three certain Porterfield warrants, above referred to, at twenty dollars ($20) per acre, he shall, if he so elects, be permitted to receive the same back upon the payment to the said Abram Mathews of the sum of twenty dollars per acre in the event of said application being rejected and refused by the highest authority having jurisdiction over such matters.

"It is hereby further agreed that in consideration of an undivided one-eighth interest in and to the above described lands, conditioned upon the title thereto eventually vesting in the said Abram Mathews from the United States, the said W. C. Hill will, at his own expense, use his whole influence and legal ability in the direction of forcing the aforesaid applications to a successful issue, and, if possible for him to do so, to secure patents from the United States for the aforesaid lands, all or in part, in the name of the said Abram Mathews.

"In consideration of such influence and legal assistance, the said Abram Mathews hereby agrees, upon receipt of patents from the United States covering the lands aforesaid, or any portion thereof, to deed to the said W. C. Hill an undivided one-eighth interest in and to such parcels of the said lands, and as title may vest in him from the United States, through the assistance and procurement of the said Hill.

"It is expressly understood and agreed by and between the parties hereto that, in the event of the failure of the said Hill to procure, or cause to be procured, patents from the United States to issue to and in the name of Abram Mathews, then he, the said W. C. Hill, is hereby estopped from demanding or securing any compensation for his services in trying to secure the said patents."

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From an inspection of this contract it is very plain that the plaintiff was to be employed by the defendant as attorney in procuring the successful location of the lands in question, and was to use his best endeavors, as such attorney, for that purpose. The duty and obligation which the plaintiff assumed by the contract was to use his best endeavors and efforts and influence and legal ability in forcing a successful issue; and, upon doing that, if he failed in his efforts, he was to be allowed to buy the scrip back, at the same price ($20 an acre) as was paid him by the defendant; and if he won the case in the General Land-office he was to have one-eighth of the land itself. The plaintiff claims that he did appear before the land department at Washington, and sought to obtain a favorable decision of the department against cash entry men, who had purchased of the government the lands described in the contract, and that he was employed in claims by homesteaders or actual settlers upon lands, where the same questions as in the Mathews case were involved, among which was, whether such lands were subject to purchase, and he preferred to press these cases as having greater equities than the scrip lands, and therefore did not urge the Mathews claim for settlement; that these circumstances excused the plaintiff from pressing defendant's claim; that on May 20, 1885, defendant wrote plaintiff the following letter:

"*Dear Sir:* Referring to the matter of the Porterfield scrip filings, I write to enquire what your views are in regard to continuing the scrip upon the land covered. If it is your wish and intention to continue the filings, as I can see no end to the fight, I should like to dispose of my interest in the scrip. I presume you can readily suggest some means of relieving me. I am the party to the record in the filings, but this need not stand in the way of my getting out. I would like to hear from you in the premises at your convenience."

To this letter the plaintiff made the following reply:

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"*Dear Sir:* The prospect of winning the Porterfield scrip locations I think was never so good as it is now. As to withdrawing the applications, that is a matter to be considered by the owners of the scrip. All I shall insist on with you is that, if they are withdrawn, the warrants, re-assigned in blank, shall be returned to me in accordance with terms of your agreement with me. Any sales you may make of your interest should be with such reservations as will enable you to do this, as of course I can hold no one else."

That on April 10, 1886, a decision in the land department, adverse to defendant's purchase of the scrip land, was made, and early in December following the defendant applied at the land-office for, and obtained, and immediately sold, the three pieces of Porterfield scrip, at $55 per acre; that in July, 1887, formal demand was made by plaintiff of defendant for the scrip, and tender was waived by defendant; that the demand was not complied with, and thereupon this suit was commenced to recover the interest claimed by plaintiff in the scrip; the declaration counting on the failure of the defendant to return the scrip, at $20 per acre. The plea was the general issue. Under the direction of the court, a verdict at $35 an acre, amounting to $4,545, was given for the plaintiff. Defendant asks a review in this Court.

It was the contention of the defendant upon the trial at the circuit, and it is the contention of his counsel here, that the plaintiff failed to give any proper attention to the defendant's case in the General Land-office, but turned it over entirely to another, to look after, so far as it was looked after, without the consent of the defendant; that the plaintiff had agreed, and that it was a part of the contract upon which plaintiff's suit was brought, that the defendant should have his personal services and his personal influence before the Commissioner of the General Land-office, and this he never had. Defendant further claims that the plaintiff failed to faithfully per-

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form his agreement under the contract to prosecute the case before the General Land-office, and, having failed himself to perform all the agreements on his part, he cannot hold the defendant liable for damages for failing to perform the other conditions of the contract; that the title to the Porterfield scrip had passed from the plaintiff to the defendant by purchase at $20 per acre, and could only be recovered back by plaintiff for the price at which it had been sold, upon the plaintiff's performing faithfully the conditions of the contract, and even then only upon service upon the defendant of a notice of election to buy back the said scrip, and tendering back the money, and this election and tender were to be upon the rejection and refusal by the highest authority to permit the location of said land; that the right of election and tender of money to buy back this scrip involved reasonably prompt action in so electing, after such rejection by the highest authority, and a delay in making such election and notice of election, as claimed in the declaration, and shown by the evidence, was not reasonable, and the defendant was not bound under the contract to hold his money tied up in this scrip; that plaintiff did not prosecute the defendant's case until it "should be rejected and refused by the highest authority having jurisdiction over such matters," and the right to buy the scrip depended on this.

Such were the theories of the respective parties, and upon these was the case tried at the circuit. The circuit judge, in his charge to the jury, adopted the views of counsel for plaintiff. In his charge, in speaking of the contract between these parties, he said:

"1. Was it such an agreement that, if Hill was negligent in prosecuting those claims before the department, he had no right whatever under this contract? Or is it the natural inference from that contract that, if he did fail, the defendant, Mathews, should have damages for the

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failure to perform the contract on the part of Hill? While it is a matter not entirely free from doubt, I think it is clear that the reasonable construction is that the contract was divisible, and that Hill was entitled to receive back the Porterfield scrip upon the failure of the department to ratify the entries. Any other inference to be drawn from that, would, in my judgment, give the contract a construction which it is not fair to suppose the parties intended.

"They agreed upon a price at which, under certain contingencies, the defendant was to return it to the plaintiff Hill. That condition has arisen, and it is not, in my judgment, a defense in this action, on the part of the defendant, to show that the plaintiff failed to do his duty in the department at Washington.

"There being no notice of this kind, it seems to me clear that the defendant cannot, under the general issue set that up, and show a defense under the general issue—set that up, and show a defense under the particular terms of this contract—that the plaintiff cannot recover, because he did not do what he agreed to do in the exercise of his influence and legal ability in the department at Washington.

"There is no attempt on his part to show that he has been damaged in any respect. There was no notice in any respect in this case attached to the plea that the plaintiff had failed to perform his part of the contract, and that the defendant would seek to recover damages on account of the failure to perform. That plea being in the case, there would be a chance for this to be shown between these parties."

Upon the question of diligence the court said:

"5. The next question is the claim on the part of the defendant that the plaintiff must fail because he did not use due diligence in election. Under this contract, he was bound to elect within a reasonable time. This, of course, must be under all the circumstances of the case; and if the defendant had not sold this scrip at the time he did, and if Mr. Hill had done nothing up to July, 1887, there would be a good deal of doubt in my mind as to whether Hill had performed within a reasonable time; but we must take into account all the circumstances bearing upon this question, and we have, on May 20, 1885, the letter written by Mr. Mathews to Mr. Hill, and

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the reply of Mr. Hill, dated May 23, 1885. Now it is important to consider the situation at that time. It is evident that Mr. Mathews decided in his own mind at that time that Mr. Hill had failed to carry out his agreement. He so stated, in substance, when demand was made of him in July, 1887. Then what object could there have been in demanding the scrip back, or in tendering the money?

"6. By virtue of the sale, the reason for a demand, in my judgment, had gone. The reason for a tender had gone when Mr. Mathews had disposed of that scrip, and Mr. Hill might have begun suit upon that, if he knew of the fact of the sale, without any demand, or any offer to tender the money, or any tender of the $20. Under the circumstances of the case, gentlemen, I do not think that laches can be imputed to the plaintiff, Hill, in not electing, It is certainly clear that the defendant has not been injured by it, unless it be upon the ground that he might purchase the stock [scrip]; but that, in my judgment, would have—other stock [scrip] might fill the place of this—but that, in my judgment, would have no bearing on the question. He disposed of the stock [scrip], claiming the right to dispose of it, denying Mr. Hill's right to it in any way or manner; and, therefore, standing in that position, his rights, and the rights of the plaintiff, were then and there determined."

As to the question of damages the court said:

"7. As to the measure of damages, that is the difference between the $20 paid and the $55 for which it was sold, with interest from the time the tender or waiver was made on the part of the defendant."

These seven paragraphs of the charge were all excepted to by defendant's counsel.

In construing the contract it must be taken as a whole. Its separate parts cannot be taken as so many different agreements, and each considered by itself. No one is able to say that one part would have been made if the other had not been. There is no reason for believing that defendant would have purchased the scrip had not the plaintiff promised his individual services, to the best of his ability and influence, to locate it on the land

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stated in the contract. Nor can we say that defendant, after making the purchase of scrip, would have given the plaintiff an option to buy it back, only upon the condition that plaintiff would exert himself in persuading the commissioner to allow the land designated in the contract under it. This being so, the services of the plaintiff in procuring the location of the scrip desired became a condition precedent to a return of the scrip by the defendant to the plaintiff; and no such services having been proved, and none ever having been rendered, it would seem difficult to maintain the present suit, and I do not think it can properly be done.

There is no question, and I think there can be none, but that the title to the scrip passed to the defendant when he made his purchase, and his contract is executory, so far as he agreed to resell to the plaintiff; and when a promise rests upon two things to be performed for its consideration, and the party to whom the promise is made desires to enforce it, he can only do so after both things have been done. The action in this case is for a breach of the defendant's contract with plaintiff, and not for the value of the scrip. If there is no breach, there are no damages to be recovered; and if the failure to perform on the part of defendant is in consequence of the violation on the part of the plaintiff, then plaintiff must fail to recover. If the plaintiff's claim involves a question of fact about which there is testimony upon both sides, then the case should have gone to the jury.

Under the view I have taken of this case, and from the facts disclosed in the testimony, there was a question as to what the plaintiff did do for the defendant before the said land department that should have been submitted to the jury, which was not done by the circuit judge.

There may be a question whether the applications men-

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tioned in the contract were ever rejected or refused by the highest authority having jurisdiction in such matters; but suppose the decision of the Commissioner in the land-office to be such authority, the plaintiff should have made his election at once what he wished to do, and have notified the defendant. I think a fair construction of the contract on this point required such election to have been made and notice to have been given within a very few days, at most. It was not given, however, for several months after the commissioner had announced his refusal to make the application. The delay was clearly unreasonable. It was of no consequence what the defendant had done with the scrip; he should have had an opportunity to have returned it, or replaced it by other like scrip, and this he did not have.

For the foregoing reasons I think the judge erred, and that the judgment should be reversed, and a new trial granted.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

OLIVER CHRISTMAS v. PETER FREI.

Contract—Receipt—Fraud—Parol evidence.

The main question in this case is held to be whether there was any evidence to go to the jury tending to show fraud in obtaining the contract or the receipt referred to in the opinion, which question is decided in the affirmative.

Error to Marquette. (Grant, J.) Argued October 29, 1889. Decided December 28, 1889.

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Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

F. O. Clark, for appellant, contended:

1. The fact that plaintiff had a different understanding of the contract, notwithstanding it was read and shown to him, will not show fraud in any sense; citing *Adair v. Adair,* 5 Mich. 204; *Nye v. Van Husan,* 6 Id. 329; *Kulenkamp v. Groff,* 71 Id. 675.
2. Parol evidence cannot be received to add to the terms of a written instrument; citing *Sutherland v. Crane,* Walk. Ch. 523; *Adair v. Adair,* and *Kulenkamp v. Groff, supra; Skeels v. Starrett,* 57 Id. 352; *Cline v. Hubbard,* 31 Id. 239.
3. Fraud cannot be presumed, but must be proved, the same as any other fact; citing *Robert v. Morrin,* 27 Mich. 308; and actual deception must be shown; citing *Hamilton v. Billingsley,* 37 Id. 107; and a verdict like the one at bar should be set aside; citing *Campau v. Lafferty,* 50 Id. 114, 117.

Mapes & Kinkade, for plaintiff, contended:

1. A parol agreement as to the consideration to be paid for a conveyance of land need not be in writing in order to be enforced after a conveyance has been made, and may be enforced *then* according to its terms, although the deed recites a different consideration; citing *Nutting v. Dickinson,* 8 Allen, 540; *Price v. Sturgis,* 44 Cal. 591; *Tuthill v. Roberts,* 22 Hun., 304; *Babcock v. Read,* 50 N. Y. Sup. Ct. 126; *Miller v. Kendig,* 55 Iowa, 174.

SHERWOOD, C. J. In the month of June, 1888, the plaintiff and defendant were the owners of an option for a lease on forty acres of land in Marquette county for mining explorations, each owning an undivided half interest therein. Some time after the parties had received said option the plaintiff assigned to the defendant an additional one-quarter interest. A treaty was had by the parties with a J. R. Case, with a view of selling Case their interest under said option. The plaintiff was to have an undivided one-fourth interest in the rights under the option, and defendant, and other parties with them, were to have the other three-fourths; they bearing

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all the expense of exploring the property, and the mining and developing of the minerals found thereon, until the property should be sold.

After a short time all of the owners of the option gave to Case an option for the purchase of their interest for $15,000, which expired about June 26, and about this time Case telegraphed the defendant to go to Detroit to close a trade. Defendant sent for plaintiff, and they met at Mr. Moore's office. Mr. Moore was an attorney. Four others had become interested at that time with the parties in the original option, and all were anxious to sell at almost any price, except the plaintiff, and were willing to accept any price that defendant would take, when he met Case in Detroit, and take their *pro rata* share; and then and there, in Mr. Moore's office, the following agreement was drawn up and signed by the plaintiff:

"For and in consideration of the sum of one dollar, and other good and valuable considerations, to me in hand paid, the receipt whereof I hereby acknowledge, I hereby agree to sell, transfer, and set over to Peter F. Frei or his assigns, at any time within four days from this date, all my right, title, and interest whatsoever, of, in, and to a certain option for a mining lease, with blank lease attached, made and executed by the Iron Cliffs Company to Peter F. Frei and Oliver Cliche, for the north-east quarter of north-west quarter sec. one (1), T. 47 N., R. 25 W., Marquette county, Michigan, at and for the sum of three thousand dollars cash; and, if said money is paid to me within said four days in cash, I hereby promise and agree to make, execute, and deliver all necessary and proper papers to transfer my said interest in said option.

"*Dated Marquette, June* 26, 1888."

The plaintiff made his mark, not being able to either read or write, and in his testimony he says the instrument was never read to him; and he further testifies that the agreement was that, if Frei was compelled to take $12,000 or less on the trade, the plaintiff was to take

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$3,000 for his interest, and if the property was sold for more than $12,000 he was to have one-fourth of whatever sum was received, and the defendant represented to him that such were the terms of the written contract.

Frei went to Detroit, obtained $15,000, and returned to Marquette, and, as claimed by the plaintiff, represented to him that he had made the sale for $12,000, and upon this representation obtained a receipt from the plaintiff, reading as follows:

"I hereby acknowledge the receipt from Peter F. Frei of the sum of three thousand dollars, mentioned as the purchase price herein provided for, and I do hereby release said Peter F. Frei from all liability to me on account of said option, and the lands described herein."

The plaintiff further claims that for some time he did not learn of the true facts in the case, but, after he did, he at once brought this suit to recover the additional $750, to which he claims to be entitled, and of which he has been deprived by the fraud of the defendant.

Certain errors are claimed to have been made by the court in the admission of evidence objected to, and in submitting the case to the jury, but the main question in the case is, was there any evidence to go to the jury tending to show fraud in obtaining the contract or the receipt from the plaintiff? These questions were submitted to the jury, and their verdict is against the defendant. I think the testimony, under the circumstances surrounding the obtaining of these two instruments, tended to show the fraud claimed, and was properly submitted to the jury; and if there is any error in the case it must be found in taking the testimony, or in the charge under which it was submitted to the jury. I have looked through the testimony, and examined each of the objections made and exceptions taken, and, had not the question of fraud been raised, undoubtedly several

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of the exceptions would have to be sustained; but, in view of the issue presented and the theory of the plaintiff, the court did not transcend the rule in taking the testimony, and an inspection of the charge shows no fault in it. The law applicable to the case was fully given to the jury, and the judgment must be sustained.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

JEROME BECKWITH v. SAMUEL W. WEBBER ET AL.

Certificate of deposit — Fraudulent origin — Good-faith indorser — Subrogation.

A bank issued a certificate of deposit, in part payment for a forged draft, to a person giving his name as O. M. Thurston, who indorsed it to the order of A. Conover (he assuming both names), and, in order to have it cashed at another bank, after indorsing it as A. Conover, secured the indorsement of a third party, who acted in good faith and without any knowledge of the fraudulent inception of the paper, as did the bank cashing it. The certificate was protested and the indorser duly notified, who paid it with knowledge of the original fraud, and thereupon brought suit against the bank issuing the certificate, and it is *held*:

a—The certificate was issued to an *actual* person, who gave his name as Thurston, and in the transaction, for all purposes, is known, and can be legally held, under that name, as well as any other he may have or may have assumed.

b—The certificate is not a forgery or issued to a fictitious person, and the plaintiff had the right to make the indorsement he did, being ignorant of the fraudulent inception of the paper, and when he made it he assumed the liability of an indorser of commercial paper; and when the certificate was protested that liability was fixed, which was to the bank cashing the paper, and it became his duty to at once pay

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it, and, on such payment, the law subrogated him to all of the rights of said bank against the drawers and prior indorsers of the certificate, which he had a right to at once enforce.

c—The *status* of the plaintiff when he made the indorsement, and the equities which *then* controlled and protected his rights, continued until he was fully re-imbursed for the payment so made, unaffected by any after-acquired knowledge concerning the fraud originally practiced.

Error to Ionia. (Smith, J.) Argued October 30, 1889. Decided December 28, 1889.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

Davis & Nichols, for appellants, contended:

1. The certificate of deposit is virtually a promissory note, payable on demand, and the law applicable to promissory notes payable on demand applies; citing *Cate v. Patterson*, 25 Mich. 191; *Palmer v. Palmer*, 36 Id. 491; *Birch v. Fisher*, 51 Id. 36; *Bank v. Merrill*, 2 Hill, 295: *Pardee v. Fish*, 60 N. Y. 265.

2. The plaintiff, to be protected from the equities existing between the original parties, must be a *bona fide* holder for value before maturity; citing *Hunter v. Parsons*, 22 Mich. 96; *Helmer v. Krolick*, 36 Id. 371; *Church v. Clapp*, 47 Id. 257.

3. As between the original parties, the circumstances of the issue of the certificate can be explained, and the fraud in its inception would release the makers from liability; citing *Gibbs v. Linabury*, 22 Mich. 479; *Anderson v. Walter*, 34 Id. 113; *Smith v. VanBlarcom*, 45 Id. 371; *Soper v. Peck*, 51 Id. 563; *Bank v. Deal*, 55 Id. 592.

4. A *bona fide* holder is one who has paid value before maturity, and received the paper in the usual course of trade, without notice; citing 1 Edw. Bills, § 18; *Coddington v. Bay*, 20 Johns. 637; *Stalker v. M'Donald*, 6 Hill, 93; *Turner v. Treadway*, 53 N. Y. 650; and this is the question presented in this case as to the plaintiff.

5. The indorser of a certificate of deposit in the ordinary form assumes the same liability as the indorser of a promissory note; citing *Cate v. Patterson*, 25 Mich. 191; and he admits that previous indorsements were duly made, and warrants the title and genuineness of the paper he transfers; citing *Fish v. Bank*,

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42 Mich. 203; *Herrick v. Whitney*, 15 Johns. 240; *Shaver v. Ehle*, 16 Id. 201.

6. The legal definition of an accommodation indorser is one who puts his name there without any consideration, and with the intention of lending his credit to the accommodated party; citing 1 Pars. Notes & B. 184.

7. The indorser of a note, when obliged to take it up at maturity, does not acquire any greater rights than he had originally; citing *Webster v. Machine Co.*, 54 Conn. 394.

8. When the instrument at its inception is founded in illegality, fraud, or felony, the holder is compelled to show that he gave value for it; citing *Aldrich v. Warren*, 16 Me. 465; *Perrin v. Noyes*, 39 Id. 384; *Munroe v. Cooper*, 5 Pick. 412; *Bank v. Bank*, 10 Cush. 488.

9. By payment the plaintiff became the holder of the certificate, but with full knowledge of its fraudulent origin. He holds, however, not as transferee of the party to whom he made payment, but of the party *for* whom he paid (A. Conover), and possesses his rights, and no other; citing 2 Pars. Notes & B. 455; *Ellsworth v. Brewer*, 11 Pick. 316; *Merrils v. Swift*, 18 Conn. 257; *Emerson v. Cutts*, 12 Mass. 77; *Kingman v. Hotaling*, 25 Wend. 428; *Sater v. Hendershott*, Morris (Iowa), 118; and, if he could recover at all, it would relate back to that time, and, if under any view he could be protected by reason of his good-faith indorsement, it would be only to the extent of the consideration paid by him; citing *Huff v. Wagner*, 63 Barb. 215; *Harger v. Wilson*, Id. 237; and as he paid nothing at the time of indorsement his recovery is limited to such payment.

10. Defendants agreed to pay O. M. Thurston, or to his order, the amount of the certificate, when it was returned properly indorsed; and until this contract was complied with no liability accrued, and plaintiff has no right of action in his own name; citing *Robinson v. Wilkinson*, 38 Mich. 299; *Redmond v. Stansbury*, 24 Id. 445; and it is conceded that one or the other of the names, "O. M. Thurston," "A. Conover," is fictitious.

11. Our statute provides that notes made payable to a fictitious porson shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer; citing How. Stat. § 1580; the intent of the Legislature being to take cases out of the common-law rule holding such instruments to be void *ab initio;* citing *Bennett v. Farnell*, 1 Camp. 130; *Minet v. Gibson*, 3 Term R. 481; to obviate a difficulty in

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the way of the holder in making title and suing on a note which had been indorsed by the person to whose order it was made payable; citing *Plets v. Johnson*, 3 Hill, 112; *Bank v. Lang*, 1 Bosw. 202.

12. If the name "O. M. Thurston" was fictitious, the makers had no knowledge of the fact, and if the name "A. Conover" was false, the plaintiff is in no better condition, and the instrument is void. The signing of a fictitious name to an instrument with intent to defraud is forgery; citing *People v. Marion*, 29 Mich. 39; but we conclude that the true name was "Thurston," from the fact that he had reason, after the perpetration of the fraud upon defendants, to change his name. Then having, by his genuine indorsement, made the instrument payable to the order of a fictitious person with intent to defraud,—the indorsement of Conover being a distinct contract (*Church v. Edson*, 39 Mich. 113), through which plaintiff obtained all the rights he has in the premises upon which to base a recovery,—does it not follow that the case is not within the statute, and that no liability rests upon the makers, because the proper indorsement to make them liable has not been made, and the holders of this dishonored paper cannot acquire any title through a forged instrument? citing *Graves v. Bank*, 17 N. Y. 205; *Bank v. Bank*, 1 Hill, 287.

13. The plaintiff was an accommodation indorser without consideration, and when such an indorser has paid the demand he is entitled to recover the amount, with interest and costs; citing *Griffith v. Reed*, 21 Wend. 502; and, in the absence of any expressed stipulation, the law will imply an understanding on the part of the drawer or maker to indemnify the acceptor or indorser. On this *implied* obligation, or for money paid, an action may be had, but not on the note or bill itself; citing *Young v. Hockley*, 3 Wils. 346; *Suydam v. Westfall*, 4 Hill, 211; *Wing v. Terry*, 5 Id. 160; and the note or bill is only used as an item of evidence; citing *Bonney v. Seely*, 2 Wend. 481; and the right of recovery only accrues after the accommodation maker or indorser has paid the demand; citing 1 Edw. Bills, §§ 522, 524.

Lemuel & William Clute, for plaintiff, contended for the doctrine stated in the opinion.

SHERWOOD, C. J. The declaration in this case is on the common counts in *assumpsit*, with notice that plaint-

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iff would offer in evidence on the trial a certificate of deposit of which the following is a copy:

"$150.00. BANKING-HOUSE of WEBBER, JUST & Co.
"MUIR, MICHIGAN, May 16, 1888.

"O. M. Thurston has deposited in this bank one hundred and fifty dollars, payable to the order of himself, in current funds, on return of this certificate properly indorsed. C. W. FRENCH, Cashier."

On the back of the certificate are the following indorsements:

"Pay A. Conover or order. O. M. THURSTON.
"A. CONOVER.
"Protested for non-payment June 25, 1888."

Defendants pleaded the general issue, with notice that they would show that the certificate of deposit declared upon was obtained by fraud, deceit, misrepresentation, and false pretenses on the part of the payee, called "Thurston" in the certificate; that said O. M. Thurston, upon May 16, A. D. 1888, claimed that he had a New York draft for $350, upon which representation defendants paid said Thurston the sum of $200 in currency, and issued the said certificate of deposit; that the draft was a forgery, and of no value; that Thurston knew this; that the indorsement on the back of the certificate was a forged, false, and counterfeited indorsement; and that the plaintiff is not a *bona fide* holder of the certificate, without notice; and that plaintiff received no consideration for his indorsement, and simply indorsed as an accommodation, and for identification.

The facts are all stipulated in the case. The cause was tried before the Hon. Vernon H. Smith, circuit judge, in the Ionia circuit, without a jury, who found the facts as stipulated by the parties, and, upon the facts thus found, held, as a question of law, that the plaintiff was entitled to recover the amount of the certificate of deposit, it

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being $159.87. Defendants all join in the writ of error, assigning as reason for reversal that, upon the facts stipulated and found by the court, judgment should have been given for the defendants instead of the plaintiff.

The facts as found, in substance, are as follows:

That the plaintiff is a hotel-keeper at Oxford, Oakland county; that on June 14, 1888, the payee named in the certificate came to plaintiff's hotel, gave his name as A. Conover, and represented that he dealt in stock; that he was there two or three days, and then left; that he returned June 25, and was there at the hotel one day; that plaintiff never saw the man Conover until said June 14, and never knew anything about him or his antecedents, and made no inquiry relating thereto, except from the man himself.

That the defendants are a banking firm, and have done business in Muir, Michigan, for the last 10 years, and that Charles W. French is their cashier, and had been for more than a year prior to May 16.

That A. Conover and O. M. Thurston were one and the same person; that Thurston was at Muir, in January, 1888, and while there became acquainted with cashier French; that he then had two drafts—one on Toledo and the other on New York—cashed by French at the bank, and which were all right, and regularly paid; that on May 16, thereafter Thurston presented another draft to French, at the bank. This was as follows:

"W. H. MARTIN & Co., BANKERS.

"No. 297. ALBANY, N. Y., May 9, 1888.

"Pay to the order of Charles Adams ($350) three hundred and fifty dollars. W. H. MARTIN & Co.

"To the Fifth National Bank, New York."

Upon the back of the draft is indorsed,—

"Pay O. M. Thurston or order.

"CHAS. ADAMS.

"O. M. THURSTON."

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Mr. French took this draft, paid Thurston $200 in money, and gave him the certificate of deposit in suit for the balance.

The stipulation further states that the draft was a forgery; that there was no such firm in Albany as "W. H. Martin & Co." at the date of the draft, and that no such firm ever had any funds with the Fifth National Bank of New York, and that the indorsements upon the draft are all in the handwriting of O. M. Thurston. The draft is marked "Exhibit A," and the certificate is marked "Exhibit B," in the record.

That on June 25, A. Conover presented the certificate to the Oxford Savings Bank, and was told he would have to be identified and obtain an indorser, and thereupon Conover obtained the indorsement of the plaintiff upon the certificate as an accommodation, and for identification, but plaintiff did not go to the bank; that Conover went alone, and obtained the money; that the bank paid it in good faith, and without any knowledge of the fraud of Conover; that the indorsements on the back of Exhibit A, "Pay O. M. Thurston or order. CHARLES ADAMS. O. M. THURSTON," and on Exhibit B, "Pay A. Conover or order. O. M. THURSTON. A. CONOVER," are all in the same handwriting, viz., that of O. M. Thurston.

"That said plaintiff was never a *bona fide* holder of said certificate of deposit, for a valuable consideration, before presentation and maturity, but holds said certificate by virtue of the liability arising from said indorsement, having paid the said Oxford Savings Bank the amount paid by it thereon to A. Conover or O. M. Thurston, and taken the certificate from said bank after the said certificate of deposit was duly protested for non-payment against him, the said plaintiff.

"That the said draft, Exhibit A, was duly protested for non-payment, and returned to the said defendants, and is now in their hands, and that the said certificate, Exhibit B, was also duly protested upon presentation, and

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was returned, and came into the possession of the said plaintiff.

"That when the plaintiff indorsed the certificate of deposit on which this suit is brought he acted in good faith, and without knowledge or notice of its fraudulent origin, and when he paid the bank at Oxford, and took the certificate in question, he did so because of his liability as indorser, but when he took the certificate from the bank at Oxford, that is, the Oxford Savings Bank, he knew of the fraudulent origin of the paper, and he would not have taken it up, had it not been for his indorsement; and that the plaintiff now holds said certificate of deposit, having obtained it by payment to the said Oxford Savings Bank, after protest of the same for non-payment, the amount of said certificate."

From this statement of facts found it appears that the certificate of deposit which plaintiff now holds was duly issued in the month of May, 1888, to a person giving his name as O. M. Thurston, and was by him negotiated after the indorsement of plaintiff was obtained. The certificate was issued to an actual person, who gave his name as Thurston, and in this transaction, for all purposes, is known, and can be legally held, under that name, as well as any other he may have or assumed, so that it is not the case of a certificate drawn, payable to a fictitious person, although the name mentioned may not be the true one; neither is the certificate a forgery, but is a genuine certificate. Such, then, is the character of the certificate. If such is the case, and the plaintiff made his indorsement upon it unconditionally, without any knowledge of the fraudulent origin of the indebtedness for which it was given, the plaintiff had the right to make the indorsement he did, and when he made it he assumed the liability of an indorser of commercial paper.

When the plaintiff indorsed the certificate in good faith and the Oxford Bank, willing to take the paper with the plaintiff's name upon it as indorser, cashed the certificate in good faith, and both acted without

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knowledge or notice that anything was wrong in the matter, then the plaintiff's promise was given and his liability incurred; and when the certificate was protested for non-payment the extent of that liability was fixed. It needed no action of any court or tribunal to determine it. That liability was to the Oxford Savings Bank, and it was not only the plaintiff's right, but it was his duty, at once, after the certificate was protested, to pay the Oxford Bank the amount then unpaid; and the law then subrogated him to all the rights the bank had against the drawers and the prior indorsers of the certificate; and he, being a *bona fide* holder, became entitled at once to proceed against the defendants and indorsers to re-imburse himself to the amount he had been obliged to pay the Oxford Bank. The record shows that the plaintiff has done precisely this, and nothing more; and the judgment should be affirmed.

The *status* of plaintiff when he made his indorsement, and the equities which then controlled and protected his rights, continued until he was fully re-imbursed in the amount he was obliged to pay from the makers and prior indorsers of the certificate; and it could make no difference with his legal or equitable rights what he may have heard or ascertained in regard to fraud in the original consideration after his liability had been once established.

I see no necessity for citing authorities in support of these views; but, if any were necessary, those referred to by the counsel are quite sufficient. The principles governing the case are elementary.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JAMES HUGHES v. THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

[See 65 Mich. 10.]

Negligence—Pleading—Declaration—Practice in Supreme Court—Trial—Verdict—Polling jury—Right of juror to make statement—Denial of motion for new trial—Not assignable as error.

1. This case was not reversed on the former hearing (65 Mich. 10) on the ground that evidence was received concerning the condition of the yard in which the accident happened, and the use of it as a place of pastime by children, nor was it held that the error of the court in receiving such testimony was not cured by its being afterwards withdrawn from the consideration of the jury.
2. The appellate court does not concern itself with errors claimed to have been committed against the non-appealing party.
3. A plaintiff has the right, at least, to *attempt* to try his case upon his own theory, and to take such steps as are necessary to afford a remedy in case he is not permitted to do so, and the fact that his counsel knows that the trial court will not permit certain qustions to be answered cannot affect his right to *ask* them, or his good faith in so doing.
4. In a suit by a boy for injuries received, when only five years old, by being thrown under the wheels of defendant's engine, while riding on the foot-board, in defendant's railroad-yard, instructions to the jury that, in order to find a verdict for the plaintiff, they must find by a preponderance of evidence,—

   a—That the boy was on the foot-board, and was seen by the engineer, who, after seeing him there, started the engine without ascertaining whether the boy had got off;—

   b—That the engineer was guilty of gross negligence;—

   c—That the boy, by reason of his insufficient intelligence, was unable to comprehend the danger, and was not guilty of contributory negligence,—

   Are not misleading or inconsistent, and sufficiently define the gross negligence referred to.
5. Every presumption is in favor of the correctness of a verdict, and when the jury is polled is the time for a juror to speak,

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if he has anything to say against or in explanation of such verdict.

So *held*, where, after the announcement of a verdict for a plaintiff, defendant's counsel asked that the jury be polled, whereupon one of the jurors arose and attempted to address the court, but the clerk was directed to proceed with the polling of the jury, and the juror, in answer to the usual question, twice repeated, answered that it was his verdict, and after the court had discharged the jury from the further consideration of the case, but before they had left their seats, the juror again attempted to address the court, but was not allowed to speak, and, in answer to a request of defendant's counsel that the juror be heard, the court stated that the verdict had been taken in the proper way and the jury discharged, and if the juror had any explanation or complaint to make it was his duty to come and see the court, to which statement an exception was taken by defendant's counsel; which action of the court is sustained, it not appearing that the juror at any time stated that the verdict was not his, or of his own free will, or that he went to the judge with any complaint or explanation after the jury was discharged.

6. A motion for a new trial, with the accompanying affidavits, forms no part of the record, and are not brought up on writ of error (*Final v. Backus*, 18 Mich. 233); nor can error be assigned in a civil case upon a refusal to grant the motion. *Dibble v. Rogers*, 2 Mich. 404; *Cuddy v. Major*, 12 Id. 368; *Mining Co. v. Brady*, 14 Id. 263; *People v. Judge*, 20 Id. 222; *Jones v. Hobson*, 37 Id. 36; *Toulman v. Swain*, 47 Id. 85; *Nelson v. Mining Co.*, 65 Id. 288.

Error to Wayne. (Gartner, J.) Argued October 30, 1889. Decided December 28, 1889.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

George Jerome (*Otto Kirchner*, of counsel), for appellant, contended as stated in the opinion, and also:

1. A juror has a right to be heard either in explanation or correction of the verdict as announced by the foreman; citing *Horner v. Watson*, 6 Car. & P. 380; *Martin v. Morelock*, 32 Ill. 485; *Green v. Bliss*, 12 How. Pr. 433; *Blackley v. Sheldon*, 7 Johns. 34; *Fitzpatrick v. Himmelmann*, 48 Cal. 588; *Regina v. Vodden*, 22 Eng. Law & Eq. 596; *Breck v. Blanchard*, 27 N.

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H. 100; *Stewart v. People*, 23 Mich. 77; *Farrell v. Hennesy*, 21 Wis. 632.

2. In support of the contention that it was error to refuse to grant the motion for a new trial, counsel cited *U. S. v. Reid*, 12 How. 361.

S. E. Engle (*Levi T. Griffin*, of counsel), for plaintiff, contended for the doctrine stated in the opinion.

MORSE, J. This case has been in this Court once before, and is reported in 65 Mich. 10 (31 N. W. Rep. 603).

The usual questions as to the negligence of plaintiff and defendant in cases of this kind are not found in this record. The defense objects to the charge of the court, contending that a different case was submitted to the jury than that alleged by the plaintiff in his declaration; also that it was inconsistent and misleading, but in what respect is not very clearly pointed out. No fault is found in the admission or rejection of testimony on the trial, nor is any of the evidence given in the record. We are asked to deal with supposed erroneous conduct of the attorneys for plaintiff sanctioned by the trial court, and also with alleged error in the proceeding attending the reception of the verdict of the jury.

It is also claimed that the declaration does not state a cause of action. We think that the objection to the declaration is a very technical one, and has no merit. The counsel for defendant contends, first, that this Court held when the case was here before, and that the circuit court upon the last trial submitted the case upon that theory, that the plaintiff could not recover unless the jury found that he was standing upon the foot-board of the engine, and the engineer saw him there when he started the engine, and did not previously give him an opportunity to get off, and that the declaration has no

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allegation to this effect, but proceeds upon the theory that the engineer and other agents of the defendant did not see plaintiff on the foot-board of the engine, whereas, if they had used reasonable care, they would have seen him there, and that their failure to thus see him was negligence.

Since the case was here before, there have been two trials, under an amended declaration, which the defendant's counsel admits attempted to allege that the engineer saw the boy upon the foot-board at the time of starting the engine; but he claims that the attempt was a failure, or, if the amendment can be construed to mean what it was intended to mean, it is so inconsistent with other portions of the declaration that it cannot stand. It seems, therefore, that the declaration has misled no one; the counsel for the defendant being aware what was meant and intended by the amendment, and the counsel for the plaintiff supposing all the time, and still insisting, that he stated in such amendment clearly enough what he intended to say. The record also fails to show that any question has ever been raised upon the sufficiency of this declaration in the court below, although it was amended soon after it was first in this Court, and there have been two trials since such amendment.

The declaration avers, among other things,—

"That it was the duty of the defendant and its said agents to see the said plaintiff when going and being on the premises aforesaid, and to warn him of the danger, and to order him off, and to compel him to go off, and avers that, by the exercise of ordinary care and diligence, they could have seen him when going and being on and about said premises and engines, and that he was in plain sight of them all; *and that they, the said engineer and other servants of defendant, did see the plaintiff while standing on the end of the step, at the time of and immediately before starting the engine as aforesaid, and saw*

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him on defendant's premises during the whole time he was there as aforesaid preceding the injury, to wit, about six or eight minutes, and that it was their duty not to start the engine while he was standing on said step, or to so manage or so check the engine, and then immediately propel it forward as aforesaid, without looking to the front of it, and without ordering the plaintiff off, and allowing him to get off, but that said defendant, by the wrongful conduct, carelessness, and negligence of its said servants, took no notice whatever of the plaintiff's presence, and gave him no notice whatever of any danger, or to leave said premises, or to get off from said engine, but did wrongfully, negligently, and carelessly allow said plaintiff to go and be on said premises, and to ride upon the platform aforesaid, and to be thrown therefrom, and injured as aforesaid."

The portion in italics constitutes the amendment. If this does not clearly enough charge that the engineer saw the boy standing on the end of the step (foot-board) at the time of the starting of the engine, then I fail to understand the meaning of plain Anglo-Saxon words, nor do I find any inconsistency between this amendment and the balance of the declaration.

In relation to the objections made to the opening of the counsel for plaintiff the counsel for defendant claims that, when the case was here before, it was reversed, among other things, on the ground that evidence was received—

"Concerning the condition of the yard in which the accident happened, and the use of it as a place of pastime by children, and some similar matters;"—

And that it was held that the error of the court in receiving the testimony was not cured by its being afterwards ruled out and withdrawn from the consideration of the jury. In this the learned counsel is mistaken. This Court did not reverse the case on this ground, or hold as claimed by counsel. The only reference to this matter in the majority opinion by Chief Justice CAMPBELL is

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when, in speaking of the allegations in the declaration, he says:

"Other facts were set up concerning the condition of the yard in which the accident happened, which ran from Hastings street across a block, and the use of it as a place of pastime by children, and some similar matters, all of which, although gone into on the trial, were finally ruled to be improper by the judge in his charge. This final ruling was in accordance with the decision of this Court in *Chicago & N. W. Ry. Co. v. Smith,* 46 Mich. 504, concerning such premises, where it was held, in a very similar case in all its circumstances, that the company could not be held, under such circumstances, for anything less than wanton and gross negligence, involving reckless misconduct."

The opening of plaintiff's counsel complained of is as follows: Mr. Engle stated that the injury for which recovery was sought happened in the railroad yard of the defendant at Detroit, and then proceeded to further state as follows:

"Along this back-yard and at the rear of their dwellings [meaning the dwelling of plaintiff's family, which was located at a point immediately adjacent to said yard] there were no fences whatever."

Thereupon defendant's counsel interrupted, and stated that he objected to the statement as immaterial and irrelevant. Plaintiff's counsel then further proceeded:

"It cannot be objected to. We may describe the locality; we have a right to describe the locality of the premises. There was nothing to obstruct the view from where these witnesses were, down to and over the railroad grounds. We shall show that the little boy had seen children ride on that step, and on this occasion he tried it."

And thereupon the defendant's counsel further objected to the statement as irrelevant. And thereupon the court said:

"As far as that is concerned, I do not see how I can limit counsel in his opening. I cannot anticipate what he is going to say."

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To which remark of the court defendant took an exception. And thereupon the plaintiff's counsel further stated:

"We propose to offer to prove upon what grounds we claim."

Thereupon the court stated

"You can go on and take your own chances on the opening;"—

To which ruling of the court the defendant excepted. And thereupon, subject to the objection and exception of the defendant's counsel, the plaintiff's counsel did continue his opening address to the jury, as follows:

"Our claim for damages in this case, in the first place, was $10,000. This case was tried, and went to the Supreme Court, and came back here for a new trial. We applied to this court—having known more about the case and understood its aspects—we applied to this court to allow us to amend our *ad damnum* clause in the declaration, to claim $20,000 instead of $10,000. Upon the hearing before the court, that application was allowed, and our claim in our declaration for this injury is now $20,000.

"I may state to you, gentlemen of the jury, that there are two or three other grounds of negligence upon which we claim, but I anticipate they may be excluded from you. We claim it was negligence in not fencing those grounds. We claim it was negligence in allowing children to make a play-ground of the track, and that it was a temptation to other children, and that they should have kept the plaintiff off the premises; and that there was a row of houses along there, and they should have kept the grounds fenced. The very building in which the family lived was owned by the railroad company. I believe the title to the property was in the name of one of its officers, but held for the benefit of the company. These matters may be excluded from your consideration. If they are, why, of course, you will not be troubled with them."

It is contended that plaintiff's counsel stated that he intended to prove these matters, when he knew that this

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Court had ruled them out, for the express purpose of prejudicing the jury. The counsel for plaintiff insist that all this evidence proposed in the opening was proper in the case, and that they acted in good faith, and had the right, even in the face of the intimation of the majority opinion of this Court, to offer the evidence, and to save their points upon it, if ruled out by the circuit judge, to be used in this Court on error if the case went against the plaintiff in the court below. I think they had an undoubted right to show the locality of the accident and its surroundings, and that there was no fence between the place where the boy lived and the point where the injury occurred, and I know of no case in this State holding differently. But, in any event, they had the right to make the offer to show the condition of the locality, and to claim it was negligence in not fencing these grounds, and in allowing children to make a playground of it, and that other children were allowed to ride on these steps, and were seen so riding by plaintiff. The opinion of this Court, when the case was here before, was not binding in this respect. We do not concern ourselves, when a case comes here on error, with errors claimed to have been committed against the party who does not appeal. The case was brought up here the first time, as now, by the railway company, and the question whether the court below on the first trial erred or was correct in ruling out all this testimony was not involved or argued on that appeal. The plaintiff's counsel has a right to be heard on this question, before this Court, before it is irretrievably settled against his client, and he had the right to lay the foundation in the lower court for such hearing.

The counsel claims the right to show these things to establish the fact that the boy was not a trespasser upon the company grounds, and I, for one, am not now pre-

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pared to say that he has not such right. In 46 Mich. 504 (9 N. W. Rep. 830), *supra*, the boy was a trespasser, and the engineer and fireman were on the lookout, and ordered him off and gave him time to get off, and thought he was off, when they started up the engine,—a state of facts materially different from this case. The court below seems to have acted upon the assumption that the boy was a trespasser, and had no right to be there, and therefore confined the recovery to a finding of gross negligence. It is very clear from our own authorities that if children were allowed to play on this yard, and permitted and invited to ride on the engine, the plaintiff was not a trespasser, and if he was not a trespasser it would make a vast difference in the rule of negligence to be applied to the case.

I find but one remark in the opening of counsel that can be said to have been objectionable, and that is that the building in which plaintiff lived was owned by the railway company, or that its title was in the name of one of its officers. This was not relevant or material to the issue, but it cannot be possibly said that this had any influence upon the verdict of the jury.

The remarks above made, as to the objections to the opening, will apply with equal force to the objections to the offering of proof on the part of plaintiff's counsel. The following questions were asked of one witness only, Rosa Busha, objected to as immaterial and irrelevant, and ruled out by the court under such objection:

"1. Will you state to the jury whether you have seen children before this accident, during the summer, riding upon the cars and engine, and on the foot-boards in front of the engine, and behind the engine?

"2. Will you state whether this same summer, and prior to the accident, the company had allowed children habitually to play tag, pitch pennies, and marbles all over these grounds?

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"3. And whether you have seen children climb upon the cars, and on the ladders.

"4. Whether you have seen little boys and girls attempt to climb upon the step of the engine, and seen the fireman or engineer from the rear part of the cab reach out his hands and help them upon the step.

"5. You may state whether people pass a great deal over these grounds, and up and down Hastings street.

"6. With regard to the side of the street where the little boy went on, was there any barrier, any fence, or bar of any kind, to keep any one from going from the Hastings-street sidewalk onto the grounds of the railroad company?

"7. I will ask the same question particularly with reference to the condition of things immediately along the side of the brick building,—and that probably will be all we shall wish to ask on that,—whether there was any fence or barrier to prevent persons from going from the Hastings-street sidewalk onto the railroad company's grounds immediatety south of the brick building, where the Hughes family lived."

These offers were in the same line of the opening, and I can see no good reason why the plaintiff had not the right to contend upon the trial below that these facts existed, and that if they did exist a greater and higher duty was imposed upon the defendant and its agents to look out and provide against accidents to such children. See *Keyser v. Railway Co.*, 56 Mich. 562 (23 N. W. Rep. 311); *Marcott v. Railroad Co.*, 47 Id. 8 (10 N. W. Rep. 53). But, in any event, he had the right to propound the question and take his exception, that he might bring the matters to the attention of this Court in case the verdict went against him in the court below; and there is no evidence of any want of good faith, or of any desire to prejudice the jury, in the asking of these questions. Only one witness was inquired of, and, after these questions were propounded and ruled out, no further attempts were made to bring the same matters in by other witnesses. Nor were any unnecessary questions

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asked of the witness Rosa Busha, in view of the plaintiff's theory, which was set up in his declaration and insisted upon at the trial. That plaintiff's counsel knew that the trial court would not permit the questions to be answered could not affect his rights to ask them, or his good faith in so doing. He had the right, at least, to attempt to try the case upon his own theory, and to take such steps as were necessary to afford him a remedy in case he was not permitted to do so; and this Court certainly could not foreclose the case against him by a remark in an opinion when the case was here before, upon a question not involved or argued at that time before us. *Marcott v. Railroad Co.*, 47 Mich. 5.

When the plaintiff's mother was on the stand, a witness in his behalf, for the purpose of showing that plaintiff knew the danger of going upon the premises of the company, its counsel, upon cross-examination, drew out from her certain instructions that she had given the boy prior to the injury, which instructions are not set out in the record. Plaintiff's counsel, in answer to this, said:

"We suggest that, inasmuch as the counsel has drawn out our instructions to the little boy, we would like to show to the jury, and offer to show to the jury, that the conduct of the road in allowing the boys to be in and out of the premises, and to be on the foot-board, was such that we could not make our children mind us."

"*Defendant's counsel:* This proposition is not made in good faith, and I desire to enter my protest to this species of pettifogging.

"*The Court:* As far as that last remark is concerned, it is entirely uncalled for. I suppose the ground of this examination was to form a basis of a request to charge that contributory negligence of the parents would be contributory negligence of the boy, and for that reason I admitted the testimony, although I am not certain as to what the law is on that question. As far as the proposition of Mr. Griffin is concerned, he is entitled to have that proposition placed upon the record. I shall exclude

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it, and give him an exception; but he certainly has a right to have that upon the record.

"*Defendant's counsel:* Your honor will bear with me a moment. I respectfully submit he has not a right to make such a proposition. It has been made repeatedly during this trial, and your honor has as often ruled it out, and it is not made in good faith, may it please your honor. It is for the purpose of bringing before this jury matter that does not belong there, and I desire to have an objection and an exception.

"*The Court:* You are entitled to your exception, and I will give you an exception. As far as the remark is concerned that you made a moment ago, I think it was entirely uncalled for, because, under the circumstances, Mr. Griffin would certainly have a right to have that upon record, in view of the claim on the cross-examination of the boy's mother. I shall give Mr. Griffin an exception to that proposition, and you can have an exception to the remark, Mr. Kirchner."

Error is assigned upon the remarks of the court. I am satisfied that the court was entirely right, and that the counsel for defendant was at fault in charging the counsel upon the other side with "pettifogging."

There is nothing misleading or inconsistent in the charge of the court. If anything, it was too favorable to the defendant. The circuit judge instructed the jury that they must, in order to—

"Find a verdict for the plaintiff, be satisfied, by a preponderance of evidence—

"1. That the boy was on the foot-board of the engine.

"2. That the engineer did see him upon the foot-board.

"3. That the engineer, after seeing the lad upon the foot-board, started the engine without ascertaining whether the lad had got off.

"4. That the engineer was guilty of gross negligence.

"5. That the plaintiff, by reason of his insufficient intelligence, was unable to comprehend the danger, and was not guilty of contributory negligence.

"6. In order to find for the plaintiff, you will have to find affirmatively upon each and every of those proposi-

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tions. If you do not so find, your verdict will have to be for the defendant."

What was gross negligence was clearly and sufficiently defined to the jury.

The last error assigned is that the court erred in refusing to permit Mr. Wesch, one of the jurors, to make a statement. To fully understand this question, it will be necessary to quote largely from the proceedings in the taking of the verdict. The jury retired, and, after being absent for a time, at 8 o'clock P. M. the court directed that the jury be brought into the court-room:

"*The Court:* Gentlemen of the jury, I understand that you have not been able to agree?

"*The Foreman:* No, sir.

"*The Court:* Is there any likelihood of your agreeing?

"*The Foreman:* I do not think there is.

"*The Court:* The case has taken some time, has been on trial during the entire week, and I think I will let you try again.

"*Juror Shields:* There has been an intimation, your honor—

"*The Court*: I do not care about any argument, Mr. Shields. The officer will take the jury into their room again."

At 6:58 A. M., January 19, 1889, the jury returned a verdict in favor of the plaintiff for $8,750. Defendant's counsel asked that the jury be polled. Mr. Wesch, one of the jurors, stood up, and attempted to address the court.

"*The Court:* The clerk will proceed with the polling of the jury.

"*The Clerk:* James Daly, was this your verdict, and is this your verdict?"

Mr. Daly answered, "Yes," as did all the other jurors, when the same question was put to them. When Juror Wesch was reached, the clerk said:

"George W. Wesch, was this your verdict, and is this your verdict?

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"*Mr. Wesch:* Yes.
"*The Clerk:* Do you say, 'Yes?'
"*Mr. Wesch:* Yes."

When the last juror interrogated, Mr. Shuman, answered, "Yes," the following proceeding immediately followed:

"*The Court:* Gentlemen of the jury, you are discharged from the further consideration of this case, and I may say at this time that I regret very much being obliged to keep you out all night, but I endeavored to make things as comfortable as possible, and it has not only been an inconvenience to you, but also to me.
"*Mr. Wesch:* Your honor, I would like to say—
"*The Court:* Never mind that now.
"*Mr. Wesch:* I just want to say a word.
"*The Court:* I say, gentlemen, it has not only been an inconvenience to you, but also to me. It is the first occasion on which I have kept a jury out all night, but in view of the fact that this case was tried last spring, the trial lasting several days, and in view of the fact that we have been trying it during the entire week, and that it has been an enormous expense to the county, I did not feel justified, under the circumstances, in adopting any other course than was adopted. Under the circumstances, gentlemen of the jury, you need not report here until next Monday afternoon at two o'clock.
"*Defendant's Counsel:* May it please your honor, if there is a juror here who desires to say anything, I think he has a right to be heard.
"*The Court:* If there is such a juror here, he can come and see the court.
"*Defendant's Counsel:* If there is such a juror here, undoubtedly he can come and see your honor, but, if any juror has been compelled to give a verdict contrary to his own convictions, he has a right to so state it.
"*The Court:* The verdict has been taken in the proper way, and if the juror has any explanation or complaint to make it is his duty to come and see me. The verdict has been rendered, and the jury have been discharged.
"*Defendant's Counsel:* I take an exception to your honor's ruling."

It will be noticed that at no time did the juror state

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that the verdict was not his, or of his own free will; nor is it shown that he went to the judge with any complaint or explanation after the jury was discharged. It is claimed on the argument here by defendant's counsel that the juror attempted to speak three times, and was not permitted to do so before the jury were discharged and that he had a right to be heard in explanation or in correction of the verdict as announced by the foreman; and he assumes that Wesch attempted to speak for such explanation or correction. His right to do so is not denied, and is undoubted. But every presumption is in favor of the correctness of the verdict, and the question is, is there anything upon this record to show that Wesch wished to explain the verdict or to correct it, or anything to show that the trial judge was made acquainted with such desire on the part of Wesch or had any reasonable ground to believe that this was why Wesch wished to speak, at any time before the jury was discharged? An examination of the proceedings will show that there is not, but that, on the contrary, it appears from his conduct that he was satisfied with the verdict. When the poll of the jury was demanded Wesch stood up and attempted to address the court. We are are not advised by the record that he said a word, or that the court heard him say anything, or saw him standing up. The record simply shows that the court said: "The clerk will proceed with the polling of the jury." When Mr. Wesch's name was called, and he was asked not only if this verdict was his verdict, but, "*Is* this your verdict," then was his time to speak, if he had anything to say against the verdict, or in explanation of it. He then had the opportunity, which would not have been denied to him had he taken advantage of it. But, no; he deliberately answers twice that it was his verdict, and is his verdict. In the face of this conduct of the juror,

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can it be said from the record that he arose at any time to complain of the verdict, or to say that he had been coerced into it, as claimed by defendant's counsel, or that the judge had the slightest intimation until the counsel spoke that such was Wesch's object in attempting to speak? I think not. Mr. Wesch, when he made his next attempt to speak, broke in upon the remarks of the court, and after the court had stated that the jury was discharged, and there was nothing about his desire to "say a word" that would give any one, after he had agreed to the verdict upon the poll, an intimation or hint that he then wanted to attack the verdict, to the correctness of which he had but the moment before twice solemnly certified. And we have no evidence before us tending to show that such was his object, except his own affidavit filed subsequently upon a motion for a new trial, which affidavit we cannot consider here. It is assigned as error that this motion for a new trial was denied; but we have held, over and over again, that error cannot be assigned on this ground in a civil case. *Toulman v. Swain*, 47 Mich. 85 (10 N. W. Rep. 117); *Jones v. Hobson*, 37 Id. 36; *People v. Judge*, 20 Id. 222; *Nelson v. Mining Co.*, 65 Id. 288 (32 N. W. Rep. 435); *Mining Co. v. Brady*, 14 Id. 263; *Cuddy v. Major*, 12 Id. 368; *Dibble v. Rogers*, 2 Id. 404; *Final v. Backus*, 18 Id. 218. And the motion, including the affidavit of the juror Wesch, form no part of the record, and are not brought up on writ of error. *Final v. Backus*, 18 Mich. 233. And upon *mandamus* we refused to issue an order directing Judge Gartner, who tried the case in the court below, to grant a new trial upon the presentation of the same reasons to us that are now urged before us. The judgment must be affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN, J., concurred with MORSE, J.

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CAMPBELL, J. I agree in affirming the judgment, but I do not think it was right to refuse the juror an opportunity to explain. As it appears that he coincided in the verdict, there was no harm done. In concurring in affirmance, I do so only on the errors assigned, with no suggestions beyond them.

LONG, J., did not sit.

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FREDERICA ABELE ET AL. v. SAMUEL MCGUIGAN,

AND

SAMUEL MCGUIGAN v. FREDERICA ABELE ET AL.

Equity—Cotemporaneous instruments—Construction—Life-lease—Mortgage—Bona fide holder—Mortgage notes subject to equities before due, when—Foreclosure.

1. The purchaser of several notes, and of the accompanying mortgage, *one* of which notes is then dishonored, is put upon inquiry as to *all* of the notes, and takes them subject to existing equities, the notes and mortgage being one transaction between the same parties.
2. In this case a father conveyed his farm to his son by an unconditional deed, and the son mortgaged the same to his father to secure $1,400, payable in eight annual payments of $175 each, and at the same time executed to his father and mother a lease of the premises at a nominal rental of one dollar, the object of which lease was declared to be to secure to the lessees $175 per annum for eight years, until the sum of $1,400 was paid. The lease also contained an agreement that the father and mother should have the use of the farm, and as a home for them, during their natural lives. The son went into possession and supported his father and mother on the premises until his death, when his father ejected his daughter-in-law, claiming the right to the exclusive possession of the farm, under said agreement, during his natural life; and it is held

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that the instruments must all be construed together, and that the lease was intended as an additional security for the payment of the mortgage debt, and that the clause giving the parents the use of the farm during their lives was intended to insure to them a home on the farm while they lived. Questions of waste by the father, etc., are involved, and an examination of the opinion is essential to a full understanding of the case.

Appeal from Berrien. (O'Hara, J.) Argued October 24, 1889. Decided December 28, 1889.

Original bill to restrain foreclosure of mortgage, and for accounting of rents and profits had by mortgagee. Cross-bill for foreclosure of mortgage, etc. Original complainants appeal from decree for foreclosure. Amount found due by circuit judge reduced, and decree entered for such reduced amount. The facts are stated in the opinion.

David E. Hinman and *Edward Bacon,* for complainants in original suit.

Lawrence E. Fyfe, for defendants in original suit.

MORSE, J. In March, 1869, Jonathan Rose, now deceased, was the owner of 80 acres of land in the township of Benton and county of Berrien, in this State. On the 3d day of that month he and his wife, Amelia Rose (now dead), executed and delivered to William J. Rose a warranty deed, without any conditions in said deed. William J. Rose was a son of Jonathan and Amelia, the husband of the complainant Frederica Abele, and the father of the complainants Rose. On the same day, William J. Rose and his wife gave back to Jonathan a mortgage upon the land to secure eight notes for $175 each, with 7 per cent. interest, payable annually. Each year thereafter one of these notes became due. The last one became due March 3, 1877. At the same time

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William J. and wife also executed to Jonathan and wife a life-lease, which provided that the first parties granted, demised, and farm let the said land to the parties of the second part "for and during the natural life of Jonathan Rose and Amelia Rose, his wife," the parties of the second part yielding and paying unto the parties of the first part the sum of one dollar, and the first parties to pay all taxes and assessments upon the property, and further providing as follows:

"Now, the object of this lease is to secure to the parties of the second part the payment of $175 per annum for eight years, until the sum of $1,400 has been paid. And it is also agreed between the said parties that the said Jonathan Rose and Amelia Rose shall have the use of the farm, and as a home for them, during their natural lives."

Immediately after the making of these papers, William J. Rose and family moved upon the farm, and William managed it as his own property, and supported his father and mother until he died, on March 21, 1871. Jonathan Rose then took the possession of the farm, as he claimed, under the life-lease, and ordered the widow of William from the premises, and she went. During this time some payments had been made on the mortgage, and some of the notes taken up. March 4, 1874, Jonathan Rose assigned the mortgage and the remaining notes to Samuel McGuigan. In that year McGuigan began a foreclosure, by advertisement, of this mortgage.

July 30, 1874, the complainants, Frederica Abele and the children of William J. Rose, filed a bill in chancery in the circuit court for the county of Berrien, against Samuel McGuigan and Jonathan Rose, to enjoin said foreclosure. This is the first suit, entitled as above. Jonathan Rose died in 1877, leaving McGuigan sole defendant. This action was still pending when, June 25,

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1881, McGuigan filed his bill in chancery to foreclose the mortgage. September 15, 1888, he filed an amended bill in the same suit, making Silas S. Davis and his wife, Jane Davis, parties thereto; alleging that they were in possession of the premises; claiming some rights therein. This amendment was made by stipulation of the parties, and in the same stipulation it was agreed that McGuigan's bill, as amended, should be considered as a cross-bill in the first-entitled suit; and that the bill of complaint in that case should stand as the answer of the complainants in that cause to the cross-bill of said McGuigan; and that all claims and controversies between the parties should be finally ended and disposed of in the two suits as one suit; and that any competent court, in such suit, might decree affirmative relief to any party or parties entitled thereto.

Upon the pleadings, and under the proofs taken, the circuit court for the county of Berrien, in chancery, decreed, January 31, 1889, in favor of McGuigan. Said court found due upon the notes and mortgage the sum of $1,733, and decreed that the same be paid on or before May 1, 1889, together with the interest and costs, or the mortgaged premises be sold in the usual manner under foreclosures in chancery. The complainants appeal.

The claim of Mrs. Abele and the Rose children, in their bill of complaint and in the testimony of Mrs. Abele, was that at the time these papers were executed Jonathan and Amelia Rose were aged and infirm, and desired to have William J. Rose and his wife come and reside on this land, and take care of them; that Jonathan agreed that if they would do so he would execute a complete conveyance of the land to William, for which the latter should pay him $1,600,—$200 down, and $1,400 in eight equal annual payments,—it being also the intent and agreement that William should manage and carry on

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the farm as his own; that said papers were executed in pursuance of such agreement, and the $200 was paid down; that the farm was worth over $3,000, but that it was so deeded for the price of $1,600 because Jonathan had formerly been possessed of more land and property, which he had given to his other children, while he had given William nothing before this time; that the lease was not intended to give Jonathan or his wife possession of the farm, and if, by its terms, it did so, it was a mistake; that the lease was intended for no other purpose than to secure the payment to them of $175 per year for eight years, and that it was intended that the full possession and use of the premises should vest in William J. and his heirs, and this was the understanding; that William J. Rose and family immediately moved upon the place, leaving a farm of his own in another township, and managed the farm, and took care of his father and mother, until his death; that it was supposed by all, until after his death, that he had the right to so use and control the farm.

About two weeks after his death, while the appraisers were there to inventory the property of William J. Rose, one of them called the attention of Jonathan Rose, his wife being then dead, to the peculiar phraseology of the life-lease as to the use of the farm. Until that time he had never made any claim to such use; but he then said that he should take control of the farm, and manage it while he lived. It is shown by the appraisers and others that he acknowledged the personal property, stock, and crops on the farm to be William's; and they were inventoried at first, and taken by the administratrix, his widow, as a part of his estate.

The bill of complaint alleges that the rental value of the farm when the writings were executed, and while William lived upon it, was worth more than $175 per

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year. It is further alleged in the bill, and also shown by the proofs, that within a short time after the death of William, Frederica and her children were driven by orders and threats from the land by Jonathan, who ever after, while he lived, excluded them from all possession of, or any profits from, the same. It was further charged in the bill that after Jonathan took possession he committed waste upon the land; that there were 30 acres of valuable timber on the land when William died, which Jonathan sold or destroyed; that within the year preceding the filing of the bill he had caused to be cut and carried away more than 60,000 feet of valuable white wood timber; that such damage by waste exceeds $500; that Jonathan allowed fences to get out of repair, and land to run down, decreasing the same in value over $200. The bill claims that these damages should be set off against the notes, as well as the rent of the premises during the life of Jonathan Rose, and after the expulsion of complainants from the land. Avers that McGuigan is not a good-faith purchaser of the notes and mortgage. Prays an accounting with the defendants, Jonathan Rose and McGuigan, and that there may be set off against the unpaid notes and the mortgage any sums of money for which said Rose was accountable by reason of waste in cutting timber, or rent or use and occupation of the premises.

Jonathan Rose, though served with process and appearing in the case by counsel, never answered.

McGuigan, in his answer, admits the execution of the deed, mortgage, and life-lease, but asserts that the language of the lease asserts its true meaning. Denies that it was ever intended that William J. Rose, in the lifetime of Jonathan, should have the use and occupation of the premises. Denies that $200 was paid down when the papers were executed. Denies all the other material

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allegations of the bill, and sets up the true agreement and facts as follows:

"That the said William J. Rose and his wife, Frederica, were poor, and without means, and the said Jonathan and Amelia were old; that the said William J. was anxious to make his home with the old folks, the said Jonathan and Amelia, and obtain, if possible, title to the farm then and for a long time prior thereto owned and occupied by them as a homestead, and which was then worth about three thousand dollars. That on or about the 3d day of March, A. D. 1869, the said William J. did, after repeated and persistent endeavor, and by soft murmurings of sweet nothings, induce his parents, the said Jonathan and Amelia, to enter into an agreement substantially as follows: That at the death of the said Jonathan and Amelia the said William J. should become entitled to, and should own, the said described premises; that in consideration thereof the said William J. should pay to said Jonathan the sum of $1,400, in eight equal annual payments, with interest at seven per cent. per annum, payable annually. And it was agreed that the said William J. and his wife, Frederica, should tend to and care for their aged parents, the said Jonathan and Amelia, during their natural lives, in a kind and loving manner. That thereupon the said deed, life-lease, and mortgage, and the notes evidencing the sum secured thereby, were drawn and delivered as before stated. That subsequently, in order better to carry out the agreement by which the said William J. and Frederica were to care for the old folks, as hereinbefore set forth, the said Jonathan rented the farm to the said William J., and allowed him, and his wife and family, to occupy the house thereon jointly with himself and wife, Amelia."

Denies that Frederica and her children were expelled from the premises by Jonathan, but avers that she deserted him and the place. Admits that at the time he purchased the notes and mortgage he had notice of the life-lease, but denies that he was informed or knew of any waste committed, or damage done the premises, by the taking of timber or otherwise. Avers that he has

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been informed since that Jonathan did sell some timber, but that Frederica received the pay for the same, except a few dollars, and alleges that he bought said notes and mortgage in good faith, and for value.

At the hearing of the case, in January, 1889, the following further stipulation was made:

"All the testimony in the case shall be considered by the court, and all pleadings shall be deemed to have sufficient allegations to support the testimony."

I am satisfied that the intention of the parties in the execution of the deed, notes and mortgage, and life-lease was as claimed by the complainant, and that it was supposed by all the parties that the language of the lease conformed to such intention, until after the death of William J. Rose, and that the first idea that Jonathan Rose had that he could absolutely control and manage the farm under such lease was after his attention was called to the last clause of it by Mr. Vandevere, one of the appraisers of William's estate. William, while he lived, controlled and managed the farm as his own, with the consent of Jonathan. The claim that Jonathan rented it to William is not sustained by the evidence. The counsel for McGuigan claims that the fact that Frederica, as administratrix, inventoried only two-thirds of the growing crops as the property of the estate, bears testimony in favor of the rent theory; but this was done after Jonathan made up his mind to take advantage of the lease. The appraisers testify that while they were there he pointed out all the property as William's, and laid no claim to any of the growing crops.

The three instruments must be construed together; and in that light, and in view of the evident understanding of the parties, it must be held that the lease was intended as an additional security to the payment of the notes, and the last clause was intended simply to insure to

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Jonathan and Amelia a home there on the farm while they lived. If the word "and" had been left out, it would, in my opinion, have correctly expressed the intention of the parties, thus:

"That the said Jonathan and Amelia shall have the use of the farm as a home for them during their natural lives."

If the object of the lease was, as stated in it, to secure the payment of $175 per annum for eight years, what purpose was the lease to serve after this money was paid? If under it Jonathan was to have the complete use, control, and management of the farm during his life, where was the security in it for the payment of this money? The terms of the lease, and the possession and control of the place, would be in Jonathan, whether the $175 per year for eight years was paid or not. And there was nothing in the lease that would prompt William to pay the money, or tend in any way to secure such payment to Jonathan, as, under the theory of the defendant, the lease would remain, and its operation and terms be, the same after payment as before. This lease is ambiguous and not easily explainable, as it stands. The intent of the parties cannot be certainly gathered from it. We are therefore authorized to go outside of it, for these reasons, and also because, standing alone, it is not the entire contract of the parties. We must go to the deed, the mortgage, and the other facts surrounding the transaction of the execution of the three instruments, and get the intent of the lease therefrom. And it is safe, as well as just, to take the intention of the parties as manifested by their acts at the time, and thereafter until William's death. Following this intent, we must hold that Jonathan had no right to take possession of one-third of the crops on the place when William died, or to expel Frederica and her children from the farm, which he did.

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McGuigan cannot, in any event, be considered a *bona fide* holder of the mortgage. He admits in his answer that he knew of the life-lease, or had notice of it; and he could not well be ignorant of the fact that Jonathan was selling timber off from the place which he had no right to sell. He is not sworn in the case. But, whether he knew these things or not, one of the notes was dishonored, and had been for a year. Another became due, excluding days of grace, the day before he took the assignment of the mortgage. Jonathan Rose was sharp enough to prevail upon or otherwise induce Frederica to pay nearly all the money she could raise from the personal property of her husband upon the debt; and she had taken up the first three notes, and paid $25 on the fourth, November 18, 1871, in the fall after William's death. The notes that McGuigan bought fell due in 1873, 1874, 1875, 1876, 1877. He purchased them in 1874, March 4. The notes and mortgage were one transaction. He had notice from the face of them that the notes were all executed upon the same day, and the mortgage secured all of them. Buying them together, he could not be a good-faith holder of any of them. One of them being past due put him upon inquiry as to that note; and an inquiry as to the dishonored note would involve an investigation into all of them, being all one transaction, and all executed by one person to the same person. He not only took one, but all of them, subject to the equities between William J. Rose and his heirs and Jonathan Rose. This may account for the fact that he paid only $700 for them, when the assignment of the mortgage covenanted that there was "$940, and perhaps more," due upon it.

The decree of the court below gave to McGuigan the face of the notes, with interest. The following deductions should have been made: Fifty dollars, with interest

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from March 4, 1874, money received by Jonathan Rose from the sale of timber to Higbee. The proofs show that Rose sold to Higbee at least about 63,000 feet of valuable timber. Through the efforts of the bondsmen of Frederica, as administratrix of her husband's estate, and the judge of probate, Higbee was induced to settle with her at $8 per 1,000 feet, less $50 that he had previously paid Jonathan, and $100, the estimated cost of cutting and hauling the logs. It is plain that the settlement with Higbee was an easy one for him, and that Frederica received no adequate compensation for the damage done to the estate by the cutting of timber. It is claimed by the counsel for the children that Frederica had no authority to settle with Higbee, and receive the money, and that they are entitled to set off the whole damage against the mortgage; but we shall allow the sum received by her to stand as a payment towards the damage. We think, however, that $150, besides the $50 paid to Rose, must be credited against the mortgage; in all, $200, for waste, with interest at 7 per cent. from March 4, 1874. There was further waste of the premises after the mortgage came into McGuigan's hands, by Jonathan, while he lived, and also by Silas Davis, his son-in-law, who took possession of the land after his death; but this we cannot reach in this proceeding, as it cannot be charged up against McGuigan. There must also be a credit of $50 from November 18, 1871, for one-third of crops wrongfully claimed and taken by Jonathan.

Jonathan, also had the use of the farm after William's death. The rental of the same was variously estimated from $175 to $240 yearly. Jonathan was entitled, probably, to his living thereon, as Frederica did not care for him, which was his own fault. We shall credit upon the mortgage $50 for three years, making $150 with interest at 7 per cent. from March 4, 1874. These deductions, as

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I compute them, with interest until January 31, 1889, the date of the decree below, at 7 per cent., amount in all, principal and interest, to $825.55. This, deducted from the amount of the decree, $1,733, leaves $907.45.

A decree will be entered here in favor of said Samuel McGuigan for that amount, with interest at 7 per cent. from January 31, 1889, less the costs of both courts, in favor of complainants, to be taxed. The balance remaining after such costs are deducted to be paid on or before 60 days after the taxation of costs, or the premises to be sold to satisfy the same, in the usual manner of foreclosure sales.

The other Justices concurred.

THE PORTAGE LAKE BRIDGE COMPANY v. CHARLES A. WRIGHT, AS RECEIVER OF THE MINERAL RANGE RAILROAD COMPANY.

Contract—Construction.

This case involves the construction of a contract by which a railroad company agreed to keep in repair the road-bed or roadway across the draw in a draw-bridge used by it, and a bridge company agreed to keep in repair the highway or roadway across said draw-bridge used exclusively by it, and it was mutually agreed that all other portions of said draw-bridge, its piers and abutments, should be maintained in common by both of the parties; and it is held that the wheels supporting the draw, upon which it rested and turned, were manifestly included with the "*other portions of the draw-bridge*" mentioned in the contract.

Error to Houghton. (Williams, J.) Argued November 14, 1889. Decided December 28, 1889.

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Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Stone & Gray, for appellant.

Allen F. Rees (*T. L. Chadbourne* and *R. C. Ostrander,* of counsel), for plaintiff.

[The briefs of counsel are confined to a discussion of the true construction to be placed upon the contract.—REPORTER.]

SHERWOOD, C. J. This case comes before this Court upon special findings of the circuit judge.

The action was brought to recover for one-half of the money expended in repairing and replacing the bearing wheels under the draw in a draw-bridge, under a certain contract made between the parties for constructing, maintaining, and operating the bridge across Portage lake. The contract referred to, or so much of it as is material to this case, reads as follows:

"1. The said party of the first part [being the Portage Lake Bridge Company], in consideration of the sum of one dollar to it paid by said party of the second part, and of the covenants and agreements of said second party hereinafter mentioned, does hereby give and grant unto the said party of the second part, and to its successors and assigns, a right of way over and across the bridge of said first party, its piers, abutments, and approaches, for the purpose of constructing, operating, and maintaining a railroad, said right of way to be for a crossing for said railroad over said bridge, not exceeding thirty-two (32) feet in width on each side of the center line of the railroad of said second party, as the same is now surveyed, located, and staked out across said bridge; subject to the conditions hereinafter contained, and to continue during the life of the charter of said first party; and in case of the re-organization of said bridge company at the expiration of its charter, or a sale of its property and franchises for the purpose of re-organization, then the said

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second party shall have the right to use said right of way under the terms of this agreement, and this agreement shall continue in force during the life of the charter of such re-organized or new company, as the case may be.

"2. The said party of the second part is hereby authorized, and shall have the right, to enter upon said bridge, its piers, abutments, and approaches, at any time after January 1, 1886, for the purpose of constructing a new draw-bridge thereon, to consist of two decks or roadways, the lower one of which shall be for the use of said railroad company, and the upper one for the use of said bridge company. Said draw shall be constructed in a good, substantial, and workmanlike manner, and in such manner that when the same is closed it shall be available for both railroad and highway traffic. The expense of constructing said draw-bridge, together with all changes made necessary in the piers, abutments, and approaches of the bridge, shall be borne and paid by the said party of the second part.

"3. The said party of the second part, in consideration of the premises, does hereby promise and agree to and with the said party of the first part, that it will, as soon as possible after the first day of January next, and its determination to purchase said right of way, proceed to construct a good and substantial double-deck draw-bridge upon the present piers and abutments of the bridge of said party of the first part across said Portage lake, and that it will cause the same to be completed at as early a day as practicable, and will have the same fully completed on or before the first day of April, 1886, and that said draw-bridge, when completed, shall be so constructed that when the draw is closed it shall be in condition for highway and railroad traffic. Said party of the second part further agrees that it will not allow any foot-passengers to cross that portion of said draw-bridge used by it in its railroad business, except the employés of said second party, when required to cross the same on the business of said company.

"4. Said party of the first part further agrees that upon the construction and completion of said draw-bridge by said second party, as provided in this contract, it will operate and manage said draw-bridge, and pay all the expenses of the same. And the said party of the second part does hereby promise and agree to pay unto the said

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party of the first part, for the purpose of re-imbursing it for the expense of operating said draw, and its loss of traffic by reason of the construction of said railroad across said bridge, an annual compensation of twenty-five hundred dollars, payable quarterly, the payment thereof to commence at the time of the completion and acceptance of said draw-bridge.

"5. It is further mutually agreed between the parties hereto that the said railroad company shall keep in repair the road-bed or road-way across said draw used by it, and that said bridge company shall keep in repair the highway or road-way across said draw-bridge used exclusively by it, and that all other portions of said draw-bridge, its piers and abutments, shall be maintained in common by both of the parties hereto, each party paying one-half the expense thereof.

"6. It is further mutually expressly agreed and understood between the parties hereto that, in case of any injury to said draw-bridge by reason of the collision therewith of any boats or water-craft navigating Portgage lake, the expenses of all repairs made necessary by any such collision shall be borne and paid equally by the parties hereto; and, in case any damages are recovered from any person or corporation injuring said draw-bridge, the same shall be divided equally between the parties hereto."

The circuit judge after finding the contract to be as above stated, and that the receiver of the railroad company was duly appointed, and that plaintiff was authorized to bring this suit, further found—

"That the iron wheels, for one-half of the expense of the repair and replacing of which this action was brought, were those upon which the draw or draw-bridge turned and swung upon the pier supporting the same, and were an essential part of said draw-bridge or draw, and as such were, under the contract in evidence, built and constructed by the said Mineral Range Railroad Company, and were no part of the road-bed or roadway across said draw used by said railroad company, nor any part of the highway or roadway across said draw-bridge used exclusively by the plaintiff.

"That said iron bearing wheels having worn out by the operation and turning of said draw-bridge, the said

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plaintiff necessarily expended the sum of $238.14, in the months of January, February, and March, 1889, in repairing and replacing the same, and said plaintiff, before suit brought, duly requested the defendant to pay one-half of the expense, under the contract aforesaid which defendant refused to do.

"That the draw-bridge aforesaid, as constructed, could not be operated without the said iron bearing wheels, and the same are necessary to the operation or turning of the draw-bridge."

And upon the foregoing facts the said court finds, as matter of law, the following, viz.:

"1. That the defendant, as such receiver, is liable, under the said contract, to pay to the said plaintiff one-half of the money so expended by said plaintiff in making said repairs.

"2. That said plaintiff is entitled to a judgment against the said defendant as such receiver, by reason of the premises, for the sum of $119.07, with interest thereon from February 15, 1889, at six per cent. per annum, amounting to $121.17 damages, with cost of suit to be taxed."

With the facts found there is no contention, but the defendant's claim is upon the record that the facts found do not support the judgment, and that the defendant should have prevailed.

We are all satisfied that the conclusion of the circuit judge is correct, and that the judgment should stand. It seems quite plain, we think, what parts of the renewed structure should be repaired and maintained exclusively by each party, as well as what portions were to be maintained in common, each party paying one-half the expenses thereof. The contract says—

"That the said railroad company shall keep in repair the road-bed or roadway across said draw used by it, and said bridge company shall keep in repair the highway or roadway across said draw-bridge used exclusively by it, and that all other portions of said draw-bridge, its piers and abutments, shall be maintained in common by both

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of the parties hereto, each party paying one-half the expense thereof."

The wheels supporting the draw, upon which it rested and turned, were manifestly included with the "*other portions of the draw-bridge*" mentioned in the contract, and which were to be maintained in common by the parties. The "operating and managing of the draw," meaning thereby the opening and closing of the same, as well as the diligence to be used in protecting and preserving it from injury and doing injury, was imposed upon and undertaken by the plaintiff, and for which it was to receive certain compensation specified in the contract, but this clause was never intended to cover or include the necessary repairing or replacing of any parts of the bridge embraced in the clause, "*other portions of the draw-bridge,*" found in the contract. These facts were found by the circuit judge, and we have no doubt correctly, and control the case.

The judgment at the circuit must be affirmed.

The other Justices concurred.

THE MICHIGAN CONDENSED MILK COMPANY (A CORPORATION) v. HARRIET WILCOX.

Dairy products—Sale—Adulteration—Damages—Jurisdiction—Evidence—Cross-examination—Vexatious appeal.

1. It is always proper to show the relation which a witness bears to the party litigant, and also what interest he has exhibited in the prosecution or defense of the suit, and what part he has taken, if any, as affecting his credibility before the jury.

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2. Where an expert witness based his testimony that certain samples of milk furnished him contained a larger per cent. of water, and a smaller per cent. of fat, than they ought, if unadulterated, upon comparisons and tests made of other samples of milk, he may be examined on cross-examination as to the results of such comparisons and tests.

Error to Ingham. (Peck, J.) Argued October 25, 1889. Decided December 28, 1889.

Case. Plaintiff brings error. Affirmed, and $30 as damage for vexatious appeal allowed. The facts are stated in the opinion.

Jay P. Lee (Edward Cahill, of counsel), for appellant.

R. A. Montgomery, for defendant.

CHAMPLIN, J. The plaintiff, a corporation, commenced its action upon the case on July 6, 1888, to recover damages for fraud alleged to have been perpetrated upon the plaintiff by defendant in carrying out a milk contract entered into on March 29, 1888.

The contract provided, among other things, that the defendant should sell to the plaintiff, and deliver at its milk receiving room in the city of Lansing, all the milk produced at her dairy in the township of Delhi, in Ingham county, excepting the Saturday evening and Sunday morning's milk, and excepting also so much as might be necessary for the personal family use of defendant's family, the milk furnished to be paid for on the first Wednesday after the last Saturday of each month at the rate of $1 per 100 pounds from April 1 to December 1, and $1.20 per 100 pounds from December 1 to April 1. The defendant delivered milk to the plaintiff from April 2 to June 7, when, having been notified that the company would no longer receive the milk from her dairy, she ceased sending milk to its factory. It was claimed

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by the plaintiff upon the trial that, soon after the defendant commenced delivering milk to the company, it was discovered by the company's milk inspector that the milk furnished by defendant was much below the average of normal milk in the fats contained, and that the milk had been, fraudulently, either skimmed or adulterated by the addition of water, or both.

The declaration contains two counts,—one under the statute (How. Stat. § 2244), the other a common-law count. The case was tried at the November term, and upon the application of plaintiff a new trial obtained. It was again tried at the March term, and a verdict returned for the defendant. The fraud alleged in both counts of the declaration is that—

"On April 2, A. D. 1888, and on divers other days and times between that day and the date of commencement of this suit, the defendant, knowingly, wrongfully, and fraudulently delivered to said plaintiff said milk, skimmed, and adulterated by the addition of water thereto," to the damage of the plaintiff $150.

The testimony is all returned and printed in the bill of exceptions. It appears that the milk delivered by the defendant was the product of two cows, and the total quantity delivered was 2,844 pounds, for which she received, according to the contract price, $28.44.

No special damages are alleged in the declaration; and no damages were proved upon the trial, except that plaintiff purchased the milk by weight, and, according to the testimony of Dr. Kedzie, that there was an excess of water in the milk of one-fifth or one-sixth. If this should be taken as the basis, the damages would not exceed $5.68. If the whole quantity delivered had been pure water, and the plaintiff paid for it by the pound, and that was the only damage suffered, neither under the statutory count nor the other count in the declaration would the circuit

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court have jurisdiction. It is very strange that the plaintiff did not resort to justice's court in the first instance.

Error is assigned upon the rulings of the court in not excusing one juror for cause, and in excusing another without sufficient cause. We think the court exercised a reasonable discretion in both instances, and we are not inclined to reverse the case upon these grounds.

Error is also alleged upon rulings of the court in permitting certain interrogatories to Dr. Kedzie. It appears that Dr. Kedzie had, at plaintiff's request, examined several samples of milk furnished by plaintiff, with a view of ascertaining by analysis whether the milk had been adulterated; and he was produced upon the trial as an expert, and gave testimony concerning the results of his investigations; and his testimony tended to show that the sample furnished him, which was claimed to be from the milk delivered by defendant, contained a larger per cent. of water, and a smaller per cent. of fat, than it ought, if it was unadulterated milk. The defendant's attorney was allowed a pretty large latitude in the cross-examination, and was permitted to examine the witness as to the results of other samples furnished him by plaintiff for analysis. We see no error in this. The witness' testimony was based entirely upon comparison in arriving at the percentage of fatty solids in pure milk; and he based his judgment of what should be considered as the normal condition of milk, as containing certain proportions of fat in a given quantity or weight, entirely upon his tests derived from a large number of experiments.

We do not think the errors assigned upon the examination of the witnesses who were connected with the plaintiff corporation are well taken. It is always proper to show the relation which the witness bears to the party

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litigant, and also what interest he has exhibited in the prosecution or defense, and what part he has taken, if any, as affecting his credibility before the jury.

After a careful consideration of all the errors assigned, we do not find any that calls for a reversal of the judgment, and it is affirmed. We think this a case that calls for the assessment of damages for vexatious appeal, and we allow $30 for such damage.

The other Justices concurred.

78	435
86	551
86	630
78	435
106	225
78	435
123	358
78	435
d137	198

THE TOWNSHIP OF PORT HURON v. LEWIS POTTS.

Personal taxes—Action by town treasurer to collect.

1. A town treasurer has no authority to bring suit for the collection of a personal tax under section 85 of Act No. 153, Laws of 1885, *after* his authority to enforce its collection under his original or supplemental warrant has expired, and such suit can only be resorted to when the person assessed has no property that can be reached under said warrants, or when he resides beyond the treasurer's jurisdiction.
2. The authority of the county treasurer to issue a supplemental warrant to a town treasurer for the collection of personal taxes, under section 47 of Act No. 153, Laws of 1885, can only be exercised upon the town treasurer filing with the county treasurer the verified statement provided for by section 44 of said act, which must conform in all respects to the statutory requirements.

Error to St. Clair. (Canfield, J.) Argued October 30, 1889. Decided December 28, 1889.

Assumpsit for collection of taxes. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

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Chadwick & Wood, for appellant.

Frank Whipple, for defendant.

SHERWOOD, C. J. Suit in this case was brought by the township to recover of the defendant a tax assessed against him upon personal property in the town of Port Huron for the year 1886. The defendant removed from the township to the city of Port Huron in the month of May in that year. Plaintiff bases its action upon the statute of 1885. See Laws of 1885, p. 175.

The tax roll of the township was placed in the hands of the treasurer for collection, December 1, 1886, and remained in his hands until March 12, 1887, as appears by his return to the county treasurer. This suit was commenced May 24, 1887, over two months after the tax roll had passed out of the hands of the town treasurer, at a time when his authority to act by virtue of his warrant had expired.

It is the town treasurer who is authorized to bring suit for a personal tax, and he can only do so at such times as he is authorized to make the collection. Section 35, Laws of 1885, pp. 186, 187. When this suit was brought he was not authorized to make such collection either by warrant of the supervisor, or by any action of the board of supervisors, or by the county treasurer. Sections 27, 47, Laws of 1885, pp. 185, 190. It is only when the tax on personal property cannot be otherwise collected that the treasurer is authorized to bring suit therefor against the owner thereof. He then may bring suit in the name of the township, and garnishee the debtor of the delinquent tax-payer. See Laws of 1885, § 35. The warrant is sufficient to enable the treasurer to make his collection, if property is within his jurisdiction of the person assessed, and suit cannot be resorted to except the delinquent has no property that can be reached

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by the collector's warrant, or he resides beyond the treasurer's jurisdiction. See section 36, Laws of 1885, p. 187.

The warrant given by the county treasurer was without authority. The return made by the township treasurer did not contain the proper affidavit, as required by section 44 of the law. All the facts required by this section should appear in the return of the township treasurer, and be verified by him. It is this return upon which alone the county treasurer can act. In this case it does not contain a statement of all moneys collected by him on account of taxes, nor that the sums returned as uncollected remain unpaid, nor a statement of his inability to find any goods or chattels out of which to make the tax, nor that the amount of moneys collected is truly stated. It will be noticed by an inspection of section 44 of the law of 1885 that all of these things should be stated. Here is the provision referred to:

"The township treasurer shall also make a statement showing the taxes upon personal property remaining unpaid, the names of the persons against whom assessed, and the amount against each; and in such statement shall set forth the amount of all moneys collected by him on account of taxes, which statement shall be verified by the affidavit of such treasurer, in which he shall state, in substance, that the sums mentioned in such statement as uncollected remain unpaid; that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the person liable to pay such sums whereupon he could levy the same; and that the amount of moneys collected by him upon such tax roll is truly stated therein."

There was a clear failure to comply with the statute, and the judgment must be affirmed.

The other Justices concurred.

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LEWIS EMERY, JR., v. THE COMMON COUNCIL OF THE VILLAGE OF THREE RIVERS.

Water-power—Deed—Construction.

The owner of a water-power and adjacent lands conveyed a site for a factory, and also an undivided one-eighth of the land flowed and subject to flowage. The deed further provided that if the undivided one-eighth of the water-power *which was intended to be conveyed* did not amount to 225 inches of water the grantee should have the right to use enough water from the pond to make up that amount, subject to the reservation by the grantor of the *first* use of a sufficient amount of water properly used to drive certain specified stones and machinery in his grist-mill,—the grantee to have the *next* use of the water to the amount specified in the grant. The deed further provided that in case of any break in the dam, or necessary repairs thereto, the grantor should pay seven-eighths, and the grantee one-eighth, of the expense, except such repairs as were needed in the separate races and appurtenances of each property, which were to be made by the owners. The grantor reserved the right to raise the dam two feet. In a suit against claimants under the grantee for an alleged improper use of water under the grant, the deed is construed as follows:

a—To convey absolutely one-eighth of all the land flowed, or subject to flowage, including the water on such land.

b—Under said deed the grantor parted *absolutely* with one-eighth of his water-power, and, if the same did not amount to 225 inches of water, the grantee was entitled to the use of enough of the remaining seven-eighths to make up the deficiency, provided the grantor could spare it without interfering with the use of his grist-mill, as specified in the deed.

c—The reservation of enough water to operate the grantor's grist-mill referred to the seven-eighths of the water-power not conveyed by the deed.

Error to St. Joseph. (Peck, J., presiding.) Argued November 13 and 14, 1889. Decided December 28, 1889.

Case. Defendants bring error. Reversed: The facts are stated in the opinion.

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Howell, Carr & Barnard and *B. E. Andrews*, for appellants, contended:

1. The plaintiff claims a construction by parties,—a practical construction. But this must be one in which they all agree, or it is of no force; citing *Burgess v. Badger*, 124 Ill. 288; and the claimed construction was by tenants and subtenants, and is not shown to have been known to the owners.
2. The nature and quantity of interest must be ascertained from the instrument, and evidence of extraneous facts cannot be received to alter it; citing *Jacobs v. Miller*, 50 Mich. 119–126; *Mathews v. Phelps*, 61 Id. 332; 3 Washb. Real Prop. (5th ed.) 429, and note; 2 Whart. Ev. §§ 1050–1054; *Jackson v. Foster*, 12 Johns. 488; but the actual state of the property at the time of the execution of the deed may be shown as bearing upon its construction.
3. A deed is to be construed most strongly against the grantor, and most favorably to the grantee; citing Shep. Touch. 165; *Piper v. True*, 36 Cal. 606; and, if a grant can inure in different ways, the grantee may take it in such a way as shall be most to his advantage; citing *Jackson v. Gardner*, 8 Johns. 394; *Jackson v. Blodget*, 16 Id. 172; *Vance v. Fore*, 24 Cal. 436; 2 Dev. Deeds, § 848; 3 Washb. Real Prop. 422 (628); Martindale, Conv. 81; and exceptions and reservations are subject to the same rule; citing Gould, Waters, § 311; *Alton v. Transportation Co.*, 12 Ill. 38, 58; *Duryea v. Mayor*, 62 N. Y. 592; *Klaer v. Ridgway*, 86 Penn. St. 529; Angell, Wat. §§ 149*f*, 149*h*; *Garland v. Hodsdon*, 46 Me. 511.
4. Whatever was intended to be conveyed was conveyed,—a statement of intention controls; citing *Ousby v. Jones*, 73 N. Y. 621; *Morrison v. Wilson*, 30 Cal. 344–348; *Bobo v. Wolf*, 18 Ohio St. 466, 467; *Garland v. Hodsdon*, 46 Me. 511; 2 Dev. Deeds, §§ 836–839; *Mathews v. Phelps*, 61 Mich. 332; which intention was to convey one-eighth of the water-power. The deed conveys one-eighth of the land flowed, and one-eighth of the land subject to be flowed, in fee-simple, and the water-power being appurtenant to the land, a like interest thereof was conveyed; citing *Mandeville v. Comstock*, 9 Mich. 558; and the language following the description, viz: "Together with all and singular," etc., is important in showing that all the grantor's interest was conveyed in the land described; citing *Dubois v. Campau*, 24 Mich. 365, 366; *Hoffman v. Harrington*, 28 Id. 103, 104.
5. Under the term "appurtenances" only such easements as are necessary to a proper enjoyment of the estate granted will pass; citing *Griffiths v. Morrison*, 106 N. Y. 165.

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6. It will be admitted that the eighth conveyed is an undivided eighth, varying in quantity; that it is an eighth of the entire power and not of the eight-foot head, and that it is appurtenant to the land described in the deed; citing Gould, Waters, §§ 148, 194–197; *Baker v. Bessey*, 40 Am. Rep. 377; 3 Washb. Real Prop. 412; *Hapgood v. Brown*, 102 Mass. 452; *Curtis v. Norton*, 58 Mich. 411; *Richardson v Bigelow*, 15 Gray, 154

7. It seems beyond question that the deed deals with two things, an eighth of the whole power, and 225 inches in a portion of the whole power. The one is in fee, appurtenant to land, and the other in gross and a mere license, and as such it could not pass to heirs and assigns; citing 6 Am. & Eng. Encycl. Law, 141, 142.

8. The law favors the perfect estate, and will lessen an imperfect one rather than a perfect one; citing *Edwards v. McClurg*, 39 Ohio St. 41; *Rood v. Hovey*, 50 Mich. 395; *Erickson v. Land & Iron Co.*, Id. 604; *Garland v. Hodsdon*, 46 Me. 514, 515; *Craig v. Wells*, 11 N. Y. 315; *Wilcoxson v. Sprague*, 51 Cal. 640; *Southard v. Railroad Co.*, 26 N. J. Law, 13.

9. A definite certain description conveyed in fee is not limited by subsequent recitals, covenants, or agreements which can be referred to another and ambiguous description, or to an uncertain estate; citing *Hubbard v. Apthorp*, 3 Cush. 422; *Edwards v. McClurg*, 39 Ohio St. 41; *Barney v. Miller*, 18 Iowa, 460; and when the subsequent provision is repugant to the grant it it will be rejected; citing 3 Washb. Real Prop. 422; *Wilcoxson v. Sprague*, 51 Cal. 640–642; *Canal Co. v. Hewett*, 55 Wis. 96; *Erickson v. Land & Iron Co.*, 50 Mich. 604; *Knapp v. Wolverton*, 48 Id. 292; *Smith v. Smith*, 71 Id. 633.

Howard & Roos, of counsel, for appellants, contended:

1. That the purpose of construction is to give effect to an instrument; citing *Kiefer v. Seminary*, 46 Mich. 636; Gould, Waters, §.311, and cases cited.

2. Any restriction placed by a grantor upon a grant, respecting the use of water or rights in and to water, must be clear and unambiguous, and not repugnant to the grant; citing Gould, Waters, § 312, and cases there cited.

Dallas Boudeman and *Pealer Bros.*, for plaintiff, contended:

1. Water cannot be conveyed like realty. There is, in fact, no ownership in it, but only a right to use it. A conveyance of it, however strong it may be drawn, but transfers the grantor's rights to its use; citing Gould, Waters, §§ 304, 304*a*.

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2. The conveyance of a ferry-way includes the land under it and used with it; citing *Gerrish v. Gary*, 120 Mass. 132; and the grant of a water-ditch would include another one with which it is fed, and without which it would be useless; citing *Donnell v. Humphreys*, 1 Mont. 518, the second ditch being appurtenant to the first.

3. The grant of water easements carries with it by implication, as secondary or subsidiary easements, everything that is beneficially necessary or incident to the grant, whether mentioned or not as "privileges," "appurtenances," or the like; citing Gould, Waters, § 306; *Pomfret v. Ricroft*, 1 Saunders (Williams), 323 (note 6); *Hodgson v. Field*, 7 East, 622; *Hinchliffe v. Earl of Kinnoul*, 5 Bing. (N. C.) 1; *Pickering v. Stapler*, 5 Serg. & R. 107; *U. S. v. Appleton*, 1 Sum. 501.

4. As an "appurtenant" can therefore follow the grant of an easement as well as of land, it follows that whether or not the amount actually necessary to create the 225 inches can be obtained from one-eighth of the water, yet the conveyance is of water sufficient to amount to the 225 inches, and this grant is independent of the amount of land conveyed; and that the land or the use of it might be appurtenant to the right in the water conveyed, as well as the water might be appurtenant to the land.

5. A grantor may withhold easements or privileges in water, either by way of reservation or exception; citing *Mfg. Co. v. Whittier*, 10 N. H. 305; *Knox v. Silloway*, 10 Me. 201; *Bowen v. Conner*, 6 Cush. 136; *Wade v. Howard*, 6 Pick. 492; *Barnes v. Lloyd*, 112 Mass. 231; *Peck v. Conway*, 119 Id. 549; and these become binding upon the grantee on his accepting the deed; citing *Emerson v. Mooney*, 50 N. H. 315; *Vickerie v. Buswell*, 13 Me. 289; *Newell v. Hill*, 2 Metc. 180.

6. The words "exceptions" and "reservations" are used indiscriminately, and effect will be given to them according to the intention of the parties, irrespective of the words used; citing *Mfg. Co. v. Whittier*, 10 N. H. 305; *Cutler v. Tufts*, 8 Pick. 272; *Hill v. Cutting*, 107 Mass. 597; *Bowman v. Wathen*, 2 McLean, 366.

7. What the parties did immediately after the execution of the deed affords a safe criterion of their intention, and of the meaning of the doubtful language in the deed.

8. The situation of the parties, the subject matter of the transaction, the contemporaneous and subsequent acts, as well as the language used in the deed, should have operation in the legal effect and construction of their contract; citing *Bird v. Hamilton*, Walk. Ch. 361; *Paddack v. Pardee*, 1 Mich. 421; *Newton*

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v. McKay, 29 Id. 1; *Stuart v. Worden*, 42 Id. 160; *McConnell v. Rathbun*, 46 Id. 303; *Spaulding v. Coon*, 50 Id. 622; *Ferris v. Wilcox*, 51 Id. 105; *Mfg. Co. v. Railway Co.*, 64 Id. 123; *Smith v. Smith*, 71 Id. 633.

9. Plaintiff is protected in his construction of the deed by a long-continued, uninterrupted, and adverse use of the water-power to the extent now claimed by him, and such an uninterrupted use under a claim of right, for the statutory period applicable to real estate, will ripen into a complete title; citing Gould, Waters, § 329, and cases cited; Angell, Wat. § 200 *et seq.*; Washb. Eas. §§ 283, 354, 388 *et seq.*; *Pillsbury v. Moore*, 44 Me. 254; *Bucklin v. Truell*, 54 N. H. 122; *White v. Chapin*, 12 Allen, 516; *Townsend v. McDonald*, 12 N. Y. 381; *Law v. McDonald*, 9 Hun, 23; *Railroad Co. v. McFarlan*, 43 N. J. Law, 617; *Conklin v. Boyd*, 46 Mich. 56; *Bunce v. Bidwell*, 43 Id. 542.

CAMPBELL, J. Plaintiff sued defendants for using more water than they were entitled to under the title vested in them in the water-power of Rock river. The only important question is whether defendants owned an absolute or only a contingent interest. Plaintiff claims that defendants have no interest which is not subject to his prior claim to use the entire power for his mill, if wanted for the use of the equivalent of four run of stone. Defendants claim an absolute right to one-eighth of the power, and a qualified right to still more, if the latter is not needed by plaintiff.

I think the whole question turns on the meaning of the deed, and that it can make no difference what plaintiff has done in enlarging his improvement; and it is equally independent of any supposed policy or expectation of plaintiff or his grantors. There was nothing to prevent them from granting as much of their property as they saw fit, and it can make no difference whether *ex post facto* wisdom would have prevented the contract, had it been anticipated.

The deed in question was a grant of property needing

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some power to run it successfully. After conveying the land, it proceeds as follows:

"Together with the undivided one-eighth part of the land flowed, or subject to be flowed, by said pond, for which the parties of the first part have a title in fee-simple, together with the undivided one-eighth of all the interest the parties of the first part have in and to other lands now flowed by said pond; and it is understood and agreed by the parties that if the undivided one-eighth of the Rock-river water-power, which is hereby intended to be conveyed, does not amount to 225 inches of water, then the party of the second part, his heirs and devisees, shall have the right to use enough water from the said pond to make 225 inches, or a stream of water filling an opening 15 inches square, and the same to be used under a head of eight feet, upon the above-described premises, according to the following provisions, that is to say: The parties of the first part, for themselves, their heirs and assigns, reserve a sufficient amount of water, properly used, to drive four run of French buhr mill-stones, with all necessary machinery, first; and the party of the second part, his heirs and assigns, is to have the next use of the water, to the amount above specified, together with a proper use of the river below the bridge for tail water."

The deed proceeded to provide that in case of any break in the dam, or necessary repairs thereto, the grantors should be at seven-eighths, and the grantee at one-eighth, of the expense, except such repairs as are needed in the separate races and appurtenances of each property, which are to be made by the owners. The grantors reserve the right to raise the dam two feet. It will be observed that the liability of the grantee to bear one-eighth of the expense of the repairs is absolute, and not contingent. And if plaintiff's contention is correct, this duty will exist perpetually, although he should continually use all the water in the river, which it needs no testimony to show will always be diminishing, and not increasing.

The question is not one which can be made very much clearer by any reasoning process. There can be no doubt

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that the deed conveys absolutely one-eighth of all the land flowed, or subject to flowage, which would, according to all rules of construction, include the water on such land. But, to remove any cavil on this head, the deed goes on to speak of the "undivided one-eighth of the Rock-river water-power, which is hereby intended to be conveyed." This language is perfectly plain, and can bear but one construction, which is that the plaintiff's grantors had parted absolutely with one-eighth of their water-power. The only other provision is one which under certain circumstances allows a qualified use of enough of plaintiff's own retained seven-eighths to make up 225 inches under an 8-foot head, if plaintiff can spare it, without interfering with his own mill. It is not in accordance with the context, or the general rules of language, to make the plaintiff's reservation of enough water to run his mill refer to any more than the water which was charged with the contingent use of the water requisite to make up 225 inches. I do not think that the subsequent demand of plaintiff's mill for more water deserves any more consideration than the needs of the factory, or was any more within the intention of the parties. It appears from the deed itself that seven-eighths of the water would, presumably, supply all plaintiff's needs, with a possible surplus. It is equally clear that the grant was for a concern requiring some water-power, for which an absolute provision of one-eighth was made, with a contingent right to use more. It would not be a reasonable inference that this could, under any circumstances, be deprived of water altogether; and it would have been an absurd undertaking to keep property in repair which the plaintiff could prevent defendants from using at all.

I am unable to see any ambiguity in the grant by its terms, or any created by its context. I think defendants

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were rightfully in the use of the power to the extent of one-eighth, and that the holding otherwise was erroneous.

MORSE and LONG, JJ., concurred with CAMPBELL, J.

SHERWOOD, C. J., *(dissenting)*. Prior to 1858, Edward S. Moore was the sole owner of the Rock-river water-power at Three Rivers, in this State, on Rock river. The water-power embraced a dam and pond covering several acres, and which gave a head at the dam of about 8 feet. Mr. Moore also owned the real estate lying about the dam, and upon which it was situated. On the west side of the river Mr. Moore had and owned a factory, having one water-wheel, and taking water from the pond through an opening 15 inches square. On the east side of the river he had and owned a flouring-mill, having five wheels, each of the same make and capacity of the factory wheel. The mill contained four run of stone, and the wheels were such as were usually used in mills and factories at that time. In dry weather, in summer, the mill used nearly all the water that could be obtained from the river to run it. At other times the stream furnished much more water than was needed for the mill. A portion of the time the mill was kept running night and day, and had been operated several years previous to 1858. In that year Caldwell & Wilcox opened a factory near the dam, on the west side of the river, for making sash, doors, and blinds, and entered into a contract with Mr. Moore for the purchase of a site therefor, together with certain rights in the water-power. These were obtained, and they entered into the business, which they continued until 1859, when Wilcox sold his interest to Caldwell. Caldwell continued the business until 1860; and on November 10, of that year he received his deed of Moore on his purchase. Said deed purports to be for the con-

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sideration of $2,500, and, after describing the land for the site of the factory, continuing, says:

"Together with the undivided one-eighth part of the land flowed, or subject to be flowed, by said pond, for which the parties of the first part have a title in fee-simple, together with the undivided one-eighth of all the interest the parties of the first part have in and to other lands now flowed by said pond; and it is understood and agreed by the parties that if the undivided one-eighth of the Rock-river water-power, which is hereby intended to be conveyed, does not amount to 225 inches of water, then the party of the second part, his heirs and devisees, shall have the right to use enough water from said pond to make 225 inches, or a stream of water filling an opening 15 inches square, and the same to be used under a head of eight feet, upon the above-described premises, according to the following provisions, that is to say: The parties of the first part, for themselves, their heirs and assigns, reserve a sufficient amount of water, properly used, to drive four run of French buhr millstones, with all necessary machinery, first; and the party of the second part, his heirs and assigns, is to have the next use of the water, to the amount above specified, together with a proper use of the river below the bridge for tail water. And it is mutually agreed that in case of a break in the dam, or in any necessary repairs to the same, the parties of the first part shall be to seven-eighths of the expense, and the party of the second part one-eighth, except when a break occurs and repairs are necessary below or at the head gates of the head race to the flouring-mill, or in or around any similar improvement to the said dam, or in or around the flume to the factory on the above-described premises, in which case the repairs are to be made by the parties owning the premises on which the break occurs or repairs are necessary.

"And it is further agreed by the parties that there shall be no unnecessary waste of water, and, in case of improvement of the remainder of the water-power, proper respect shall be paid to the same, by keeping head gates shut when the water is not wanted for propelling machinery, and the flume kept tight and the dam repaired, for safety and saving of water; and, in case of the party of the second part selling or disposing of the above-described premises and water-power, all parties, their heirs and

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assigns, to whom such disposition or sale may be made, shall be bound by the foregoing covenants, stipulations, and agreements. And the parties of the first part reserve the right to raise the water in said pond two feet above the present height or level of the water.

"Together with, all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder or remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, or demand whatsoever of the said parties of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever."

The deed then continued to the close with the usual covenants of warranty.

Caldwell sold his interests under said deed to Cox & Throp during the same year, who leased the property for various purposes for some time, and subsequently allowed it to remain unused. The defendants purchased of Cox & Throp their interest in the west side water-power in 1881, for the purpose of operating the water-works in Three Rivers, and it is under this title the defendants claim the right to use the water from the river and pond necessary to operate their water-works; and it is their claim that there is sufficient water for that purpose, and also to operate four run of French buhr millstones at said flouring-mill of plaintiff, if the plaintiff should take no more than is necessary for that purpose, and running the necessary machinery. It is conceded the plaintiff owns the entire water-power, except such part thereof as passed to Caldwell by his deed from Moore.

It is claimed by plaintiff that a sufficient quantity of water was reserved in Caldwell's deed at all times to run the plaintiff's mill with four run of French buhr millstones, and the necessary machinery, as the same was

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used under an eight-foot head in 1860,—the date of the deed to Caldwell,—before any right existed to use any water by defendants, and that plaintiff is not confined, in the use of the water, to the running of the millstones, but he is entitled to its use for any purpose, so long as he does not use more than the specified quantity; but he avers that he has been deprived of such use, and of a sufficient quantity to run his mill at all, a portion of the time, by the wrongful use which the defendants have made of the water, and brings this suit to recover his damage.

The defendants claim that their title is in fee, and absolute, to one-eighth of the entire power, and under no circumstances can the mill-owners have the prior use of any portion of the one-eighth of the water mentioned in Moore's deed to Caldwell; that it is made appurtenant to the land conveyed by the deed, and, inasmuch as it is not shown that the defendants have used more than the one-eighth of the power or water, the plaintiff must fail to recover. These several contentions and claims of the parties present the theories upon which the case was tried at the circuit. The plaintiff prevailed, and the defendants bring error.

The case was ably presented by learned counsel upon both sides, both upon the briefs and the arguments on the hearing, and my impressions at that time were decidedly against the defendants; and, upon a full and careful examination of the case, since then made, I am more than ever convinced that my impressions were correct.

The decision of the case depends entirely upon the proper construction of the several clauses of the deed given by Moore to Caldwell in 1860. In giving construction to the provisions of this deed, we must take into consideration the nature of the subject-matter of which

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it treats, and to which it refers; the object to be accomplished by the contract; the situation of the parties; their familiarity with the location, and its surroundings, and the property and interests to be affected; their knowledge and ability to comprehend the business and its requirements, about which they were treating; and all the circumstances accompanying the negotiations and consummation of the agreements between them. And in the light of all these things the instrument should be read. The terms and conditions of the deed were fixed and agreed upon in the contract of 1858; and the circumstances and surroundings of the parties at that time are those which are proper for our consideration in giving construction to what the parties then did, and what they said in this conveyance.

Rock river is a small stream at Three Rivers, emptying into the St. Joseph river at that point. Mr. Moore was one of the early settlers of that village, and owned whatever water-power the stream would furnish, and early erected this large flouring-mill upon its banks, and, to secure the power to run the mill, was obliged to build a dam for that purpose, which raised the waters seven or eight feet in the river, and enabled him, by means of a race, to conduct them from the pond created by the dam to his mill in quantities sufficient to operate four run of French buhr millstones, and the necessary machinery for that purpose, except in very dry seasons, when the stream was insufficient to give him the needed power. The greater portion of the seasons, however, there was considerably more water than was necessary to successfully operate the four run of stones. The mill and the power were very valuable. The capacity of the mill was 100 barrels per day, and over, and the mill was furnished with no means of operating it other than the water-power

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mentioned. The mill and power have always been, and are now, chiefly valuable for manufacturing flour; and any decrease of the power impairs the capacity of the mill, and to that extent renders it less valuable. It is difficult to conceive that the owner of the property could be induced to enter into any arrangement by which the power to successfully operate the mill, with its four run of stones, would be lessened; but, if the position taken by counsel for defendants is correct, this is the very thing Mr. Moore did do in the deed he made to Caldwell. Evidently Mr. Moore did not understand such was the effect of what he had done, and no one appears to have thought such a thing had been done until the defendants claimed to have bought the Caldwell interest.

When Caldwell & Wilcox made their purchase, it was not for the purpose of establishing a large business in manufacturing, but to supply the local demand for doors, sash, and blinds in the Three Rivers community; and nothing appears in the record showing that the power they desired for their purposes exceeded that which the surplus water would give, after using all that was necessary at the mill for operating the four run of stones night and day. This was all that Moore could spare, and retain the usefulness and value of his mill and power; and this was, in all probability, as well known to Caldwell & Wilcox as to Moore. These facts, together with the other fact, that no one representing the Caldwell interest ever attempted to use more than the surplus water, except the defendants, are circumstances of very great significance in giving construction to this deed.

If it is necessary, in order to maintain the position assumed by counsel for the defendants in making the defense set up, that such an interpretation should be given to the language of this deed as would in its effect

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impeach and shock the common sense and good judgment of both Mr. Caldwell and Mr. Moore. I think we would be justified in hesitating a long time before adopting such position. Relying upon the interpretation given to the deed by the parties themselves and their grantees until the defendants purchased, and upon which they had all acted, it appears that large and expensive improvements had been made to the mill property until, at the time of bringing this suit, the investment amounted to the sum of about $125,000, and all of which was to the plaintiff's advantage; and it further appears that the defendants knew when they purchased the Caldwell interest that plaintiff claimed the prior right to the use of the water to the extent necessary to operate the four run of stones at his mill, and that such had always been the construction of the deed in question, under which he claimed, and conceded by defendants' grantors for more than 20 years; and that defendants bought with full knowledge upon the subject, and that plaintiff would protect and enforce his rights under the deed, as he claimed them, without question from the owners of the Caldwell interest. It is of no consequence whether the rights claimed by plaintiff arose under an exception or a reservation, so long as the intention of the parties to the instrument is plain; and I think it is, in this case. *Cutler v. Tufts*, 3 Pick. 272; *Manufacturing Co. v. Whittier*, 10 N. H. 305; *Hill v. Cutting*, 107 Mass. 597; *Bowman v. Wathen*, 2 McLean, 376. The consequences of a determination of the questions raised between the parties are too important to be rested on technicalities. Whatever was intended to be conveyed was conveyed; and a statement of that intention, or whatever amounts to that, should be allowed to control. *Ousby v. Jones*, 73 N. Y. 621; *Morrison v. Wilson*, 30 Cal. 344; *Bobo v. Wolf*, 18 Ohio St. 466; *Garland v. Hodsdon*, 46 Me. 511; 2 Devl. Deeds, §§ 836–

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839; *Mathews v. Phelps*, 61 Mich. 332 (28 N. W. Rep. 108).

So far as the construction of this deed by the action and understanding of the parties is concerned, it seems to have been all in favor of the plaintiff. I know it is claimed that the action and understandings referred to were principally with the tenants and employés of defendants' grantors, and that the testimony relating thereto was taken under the objection of defendants' counsel; but I think it was unobjectionable. Landlords are presumed to know the amount of property leased, and that tenants are informed of the same and its appurtenances; and their dealing with the property and its use are usually known to the landlords, and both are presumed to be in his interest. 2 Devl. Deeds, § 851; *Truett v. Adams*, 66 Cal. 218 (5 Pac. Rep. 96); *Lovejoy v. Lovett*, 124 Mass. 270; *Lanman v. Crooker*, 97 Ind. 163.

Upon the language of the deed itself, I think the fair construction is that the plaintiff shall have the first right of use of water sufficient in amount to run his four run of French buhr millstones, and both night and day, if he chooses. There is no restriction upon the time each day the flouring-mill may be run. The deed first conveys to Caldwell an undivided one-eighth of the land flowed by the pond, or subject to be flowed by it, when Moore held the title in fee, together with an undivided eighth interest in such rights as Moore had in the other lands flowed by the pond; second, an undivided one-eighth of the Rock-river water-power, not exceeding 225 inches of water, under a head of 8 feet, and if the one-eighth failed to give that number of inches, then the deficit could be taken from the pond. Said conveyance was, however, to be subject to the following reservation as to the use of the water:

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1. Moore was to have at all times a sufficient quantity, when properly used, to operate four run of French buhr millstones, with all the necessary machinery.

2. Caldwell was to have the next use of water, to the amount above specified, together with proper use of the river below the bridge for "tail water."

It will be noticed that the Caldwell power was entitled to water from the pond to make up its supply, so long as there was enough left therein to supply both powers. Such I understand to be the meaning of the deed, when properly construed; and such, I have no doubt, was the intention of the parties when the deed was made. And there can be no question, I apprehend, but that the quantity Moore was entitled to at his mill in 1858 plaintiff is entitled to now. Whether the power could be increased or not, by raising the dam or otherwise, was a matter of no concern to Mr. Caldwell or his grantees. Mr. Moore and his grantees were only interested in that matter.

The rule that deeds are to be taken most strongly against the grantor only applies where its construction is doubtful. I have no doubt about the proper construction of the instrument under review. The law favors equities in giving construction to deeds, and in ascertaining their true meaning. *Blake v. Madigan*, 65 Me. 528; *Erickson v. Land & Iron Co.*, 50 Mich. 604 (16 N. W. Rep. 161).

In construing a deed, all of its parts must be taken into consideration, and the bearing of each upon the others should be properly regarded; and when the parties have, in the instrument itself, expressed the intention of any particular part, while it may modify the construction to be given to other parts of the instrument, it will not necessarily control such construction.

A conveyance of land does not pass a thing appurtenant thereto, when such thing is excepted or reserved from the operation of the conveyance; and the deed of

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the undivided eighth of the land lying under the mill-pond, in this case, did not transfer the right to the water, or to the use of the same, which was reserved from the operation of the deed. I find nothing repugnant in the reservation in this deed to the grant therein made. The one-eighth of the water-power on Rock river was conveyed to Caldwell, but with the reservation I have mentioned. The fact of the grant and the reservation being contained in different clauses of the deed is of no consequence, where the intention is apparent upon the face of the instrument, or manifest from the circumstances under which it was made, that the grant was to be thus modified. The reservation once conceded, I can find no reason to question its extent. That is fixed by the quantity of water required to operate the four run of French buhr millstones, and the necessary machinery for that purpose, with the kind of wheels then in use in the mill, running the mill 24 hours each day. This amount of water was reserved to the plaintiff; and he could use that amount for running his flouring-mill, or for any other lawful purpose he chose. I do not think it would be reasonable to hold that the quantity of water reserved should be limited to the amount that was being used at the date of the deed. That should not be made a controlling circumstance, when the others are taken into consideration. It must have been then contemplated by the parties that the necessity for the use of the mill would increase as the county cleared up about it; that the grain crop would be constantly increasing; and as it was a merchant as well as a custom mill, when anything could be made in the business, it would, in all probability, be run to its fullest capacity, as now and always has been in such cases with a merchant mill. I think the circuit judge gave the right instructions upon this point.

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I find nothing further needing consideration in the assignments of error, and the judgment should be affirmed.

CHAMPLIN, J., concurred with SHERWOOD, C. J.

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JUDSON J. DIKEMAN AND ORVILLE DOUGHERTY v. OTIS ARNOLD

[See 71 Mich. 656.]

Deed—Delivery—Acceptance—Evidence—Contract for sale of land—Execution by wife—Measure of damages—Presumption of official correctness.

1. Where the fact that negotiations were pending for an exchange of land is not disputed, but the contention of the defendant, who is sued for refusing to execute a deed of his land, is that the delivery of a deed which the plaintiffs claim was made absolutely pursuant to such negotiations, at a meeting of the parties at a given date, was conditional upon the approval by defendant's attorney of the abstract of title to said land to be by him thereafter examined, what had taken place before said meeting of the parties is immaterial and irrelevant upon the issue of such delivery, unless the defendant can be shown to have said or done something before going to the place of meeting indicating an intention to accept said deed without such investigation of title.
2. The testimony of a conveyancer who acted for *all* of the parties in preparing deeds and other papers on a proposed exchange of land, as to what transpired while the papers were being drafted, is not privileged by reason of his being also the attorney for one of said parties.
3. A grantee may waive his right to the evidences of a good title, and rely upon his own knowledge, and the covenants of warranty in his deed, but is not obliged to do so.
4. The adverse possession of land by a patentee and those claiming under him for fifty years renders evidence of the non-record of the patent irrelevant in a suit involving the title to the land.

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5. Where a grantee accepts a deed without its being executed by the wife of the grantor, upon her agreement to afterwards execute it, which she does, he cannot be heard to say that the deed was never delivered to or accepted by him because of his refusal to again receive it after such execution by the wife, whose only interest in the land is an *inchoate* right of dower.

6. Where under an agreement for an exchange of land one party executes and delivers the requisite deed, and the agreement as to a conveyance by the other party is void, and he refuses to perform it, such refusal has the effect to rescind the contract and raise an implied promise to pay for what he has received upon it. *Nugent v. Teachout*, 67 Mich. 571.

7. A contract for the sale of land, a part of which is occupied as a homestead, which contract is not signed by the wife, is only void as to the homestead, and an action lies for damages against the husband for refusing to convey the remainder of the land pursuant to the contract.

8. A certificate of acknowledgment carries with it the presumption that the officer making it has certified to the truth, and the party attacking it has the burden of proof to show its falsity.

Error to St. Joseph. (Loveridge, J.) Argued October 30, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion and in the former report of the case.

O. F. Bean and *Howard & Roos*, for appellant.

Howell, Carr & Barnard and *Dallas Boudeman*, for plaintiffs.

[The points of counsel are stated in the opinion and in the former report of the case.—REPORTER.]

MORSE, J. This is the second appearance of this case in this Court. The facts and the matters in controversy were quite fully stated in the opinion of Mr. Justice CHAMPLIN when the case was here before, see 71 Mich. 656 (40 N. W. Rep. 42), and will not here be referred to

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again, except in so far as it shall be found necessary to a proper understanding of the questions here discussed.

Upon the second trial in the court below, the plaintiffs recovered judgment for $8,900.67. A motion for a new trial was made, and upon such motion it was ordered that, unless plaintiffs consented to a deduction of $799.30 from the amount of said judgment, a new trial would be granted; but, if such deduction was made, the motion would stand as denied. The deduction was made. Thereupon the defendant came to this Court upon writ of error.

The first main objection raised here to the proceedings on the trial is in relation to the admission of evidence of the talks and negotiations between the parties to the suit, and also between Shaw and the plaintiffs, prior to June 16, 1887, the day plaintiffs claim the deeds were executed and delivered, and to the instruction of the court to the jury that—

"All the talks, negotiations, and contract, made prior to the time when this deed [from plaintiffs to Arnold] is alleged to have been delivered and accepted, are wholly immaterial, except as they bear upon the question of such delivery and acceptance."

Among the items of evidence thus objected to are—

1. The conversations in detail between plaintiffs and defendant at various times prior to said June 16.
2. Testimony showing that the defendant was building an addition to his barn on his homestead, and gave directions to his help to stop work until the question of the trade was determined.
3. That he drew out manure between June 11 and 16, and that he put it on lands other than that which he talked of trading.
4. The introduction of the contract of June 11, which was shown to have been abandoned on the night of June 15.

This class of testimony is claimed to be clearly inadmissible to show delivery of the deed on the 16th, or

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afterwards, under the holding of this Court in *Pierson v. Spaulding*, 67 Mich. 640, 649 (35 N. W. Rep. 699).

The main question of fact to be determined by the jury was the delivery of the deed by Dikeman and Dougherty to Arnold, and his acceptance of it. If this was not found, the case was ended in favor of defendant. This question of delivery depended mainly upon what transpired on June 16. This was the central transaction, and the question arises, what bearing, if any, did the transactions before that time have upon the fact whether or not the deed was delivered and accepted on that day? It appears from Mr. Arnold's testimony that he agreed to the contract of June 11, as made by his son George, and that he went to town upon the 16th to make this trade, and that he there entered into the contract made upon that day; but his contention is that none of the papers passed that day, or were to pass; that it was understood and agreed that he should be satisfied with the title of the Shaw farm before the trade should be completed; that the deeds and all the other papers were to remain in the hands of Barnard, the attorney who drew them, and undelivered, until he could see Mr. Bean, his attorney, and have him look over the abstract of the title to the Shaw farm; that he took an abstract furnished by plaintiffs over to Bean's office on the 16th; that Bean was going to a funeral, and did not have time to fully examine the abstract, but told Arnold that it was not a full abstract, and he wanted to examine the will under which Mrs. Shaw claimed title, and could not attend to it that day; that the papers better not be exchanged that day; and Arnold replied that the papers were not to pass that day. In the view of the theories of both parties, testimony that Arnold stopped work on his barn before June 16, and while the negotiations were going on, and that he drew out manure on other lands than those

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involved in this trade, was immaterial and irrelevant for any purpose, as the same could have no bearing upon any legitimate issue between the parties; and, if used, as it might have been under the charge of the court, to show, or as tending to show, a delivery of the deed and a consummation of the trade on June 16, or at any time thereafter, its admission was error. And while it was proper, and perhaps necessary, to show some of the prior negotiations between the parties from the beginning as a part of the history of the transaction, and to give the court and jury a proper understanding of what was in issue, many of the talks and acts of the parties, put in testimony in detail, had nothing to do whatever with any question in the case. If any of the testimony so given had been in conflict with the final contract as made on June 16, it would not have been permitted to have any bearing or weight against the contract; and, if it were all in harmony with such contract, it could be of little use, except to show the steps leading to the transaction on the 16th. I fail to discover what bearing, if any, these talks and negotiations had, or could have had, upon the question of the delivery and acceptance of the deed by the defendant on June 16. It is not claimed by plaintiffs that any contract was completed until that day, except the contract of June 11, which was altered and modified by the arrangement claimed to have been made on the 16th.

We think that all the talks and negotiations of the parties prior to June 16, and the acts of the defendant, or any of the parties, before that time, were inadmissible, as bearing upon the question of delivery of the deed and acceptance of the same on that day, excepting the talk plaintiffs claim to have had with Arnold on the night of June 15 at his home in relation to the consummation of

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the trade on the following day. The case of *Pierson v. Spaulding*, 67 Mich. 649, is in point.

To claim that, because Arnold authorized his son George to enter into the contract of June 11, or ratified it after it was made, and because Arnold was willing to trade in some way, and said or did things looking towards a trade before June 16, the jury were to infer a probability that he accepted the deed of the Shaw farm upon an abstract admittedly showing an imperfect title, and closed the trade that day, would be erroneous, and one not to be permitted by the law. If Arnold had disputed the making of the contract of June 11, or that he ever had any idea of making this trade, or any trade, before the 16th, then these facts and acts and talks would properly have been admissible to disprove Arnold's claim. But when the theory of both parties was that a trade was being negotiated, and that they went to the office of Barnard on the 16th to close it up, and the only dispute of any importance between the parties as to what happened there was in relation to the delivery and acceptance of the deed,—the plaintiffs claiming that Arnold waived the apparent defect in the Shaw title, and accepted the deed personally, knowing that the title was good, and the defendant claiming that he did not accept such deed, and was not to accept it until his attorney had examined the title, and found it to be good,—what had taken place before that time became entirely immaterial and irrelevant upon the issue of such delivery, unless Arnold could be shown to have said or done something indicating an intention, before going there on the 16th, to take a deed of the Shaw farm without consulting his attorney or investigating the title; and we find no evidence in the case showing such an intention previous to the transactions on the 16th. Consequently, the court erred in his

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instructions in this respect, and should have charged them directly to the contrary, to wit, that the talks, negotiations, and acts of the parties previous to the 16th had no bearing whatever upon the question of the delivery and acceptance of the deed upon that day.

We think the plaintiffs were entitled to show all that took place between any of the parties in Barnard's office on June 16 in the presence and hearing of the defendant. The plaintiffs, also, were entitled to prove all that took place after the 10th between themselves and Arnold, or any act or acts of Arnold having a tendency to show that he accepted the deed on that day. It was proper to show that Dougherty moved a load of goods to Arnold's place on the 18th of June, and that Arnold would not let him unload them, and we fail to discover how this testimony could have injured the defendant. If Dougherty's moving his goods had a tendency to show that he supposed the trade was completed on the 16th, then the conduct of Arnold in refusing to let him unload them also tended to show that Arnold did not suppose the trade had yet been made, and the question in issue was Arnold's intention to accept the deed, and whether he did accept it on the 16th, and not what Dougherty supposed was done on that day.

What Arnold said and did on the 17th was admissible, as bearing upon his understanding of what had taken place the day before, under the instructions of the circuit judge, who charged the jury that, if they found that Arnold's conversations and negotiations upon that day (17th) were entered into for the purpose, and with the intention, of making a settlement or compromise of the matter in difference between him and plaintiffs, then they should give no weight to the testimony. If they found otherwise, then they might give it such weight and consideration as they should deem it entitled to.

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It was not proper to permit Mrs. Shaw, on cross-examination, to testify to what Mrs. Arnold said and did at Shaw's house on June 18.

It was proper for the defendant's counsel to ask Mr. Arnold if he accepted any deed or papers there on the 16th; but as he did in fact testify several times that he did not accept the deed, or intend to do so, the error in refusing the question was harmless.

Mr. Barnard's testimony, and that of his brother, were admissible. They were acting as conveyancers, and if they were, as claimed by defendant's counsel, the attorneys of plaintiffs, they sustained no relation to defendant which rendered the acts and words of Arnold inadmissible through their lips. They were as competent witnesses to what transpired there, while the papers were being drafted, as were any of the other persons present, and in testifying they violated no confidence placed in them by Arnold or any one else.

We do not think there is any evidence to show, as claimed by defendant's counsel, that the contract of June 11 was abandoned. It was modified by the subsequent agreement that more buildings should be reserved, and that $5,000 of the purchase price of the Shaw farm should be paid by the execution by Arnold of the mortgage to Richard Dougherty. The contracts of June 11 and June 16, with the agreement as to the mortgage to Dougherty, must be taken together as showing the complete contract between the parties as to the terms of the trade. No one of the agreements shows the whole bargain as finally attempted to be consummated.

The title to the Shaw farm was brought in issue on the last trial, and testimony was introduced by both parties as to the condition of such title on June 16. The land was willed by Garrett Sickles, the father of Mrs. Shaw, to her mother, now Mrs. Stebbins, during

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her natural life, and at her death it was to go in fee to Mrs. Shaw. A quitclaim deed was introduced by plaintiffs from Mrs. Stebbins to Mrs. Shaw, dated August 26, 1878, but it was claimed by defendant that this deed did not cover the entire farm, which claim upon the face of the deed must be conceded to be correct. It was shown, however, that at the time of making the deed the possession of the entire farm was surrendered by Mrs. Stebbins under this deed to Mrs. Shaw, who had ever since held and occupied the whole farm as her own; and it was claimed that the intention of Mrs. Stebbins was to deed the whole, of which fact Arnold had knowledge. Mrs. Stebbins was sworn as a witness for plaintiffs, and against objection testified that before she made the deed she rented the farm to Mr. Shaw, but that since then she had received no rent. She further stated that she had no right to claim any rent, as she deeded the whole place away, if Mr. Bean, who drew the deed, did the business right. This last statement the court struck out. But defendant's counsel claim that none of this evidence was proper, and that Mr. Boudeman was allowed to use it on the argument in an improper way. Mr. Boudeman, in summing up to the jury, said:

"What is there possibly wrong about the titles? The only possible wrong there could have been was in this ten-rod strip that we have been talking about. They had a warranty deed from us; if the title was not good we could make it so; and yet they say there is a ten-rod strip of about seven acres of which the title is imperfect in this way: that there is still apparently a life-estate of Mrs. Stebbins. He knew that Mrs. Stebbins left the place and conveyed her interest over to Mrs. Shaw years ago, and he had lived right beside the Shaws."

Mr. Howard: "Do you claim there is any evidence on that?"

Mr. Boudeman: "I do claim there is evidence, and he could not have lived beside them without knowing it."

Mr. Howard: "We object to the statement of the

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counsel, for the reason that there is no evidence to that effect." (Overruled, and exception taken.)

Mr. Boudeman: "I claim there is evidence in the case that he knew she conveyed her interest. He knew it from her testimony in the case. He knew that the parties lived on the place, and occupied it, and that Mrs. Stebbins had made no claim to it since she left there. Mrs. Stebbins was on the stand, and did she claim it? Had she made any claim before? Oh, no."

It is also contended by defendant's counsel that there was not a particle of evidence in the case tending to show that Arnold knew that Mrs. Stebbins had left the place, or knew that the title was good, or that he had any reason to know it. The court instructed the jury, in relation to this part of the case, that the face of Mrs. Stebbins' deed did not purport to cover all of the Shaw farm, the effect of which was to leave in Mrs. Stebbins a life-estate to that part of the land not described in such deed, and continued:

"No doubt, gentlemen, but that the defendant, Arnold, had a right to a good marketable title to the Shaw farm, which the plaintiffs were undertaking to convey to him. He could, however, have waived his right to the evidences of a good title. The question for you to determine is whether he did. The deed made out to the defendant by plaintiffs was a warranty deed, containing covenants to the effect that the title to the lands described in it was good, perfect, and indefeasible, and that the lands conveyed were free from all incumbrance. It was competent for the defendant to accept the abstract of the title in the condition in which it was at the time the papers were drawn, and to rely upon the covenants of the deed in question, but he was not bound to do so. * * * The question is not, therefore, whether it appears from the evidence given upon the trial that the title to the farm is in fact good or not good, but how it appeared to the defendant at that time, upon the evidence which he then had before him to act upon, and the knowledge he then had upon that subject, as bearing upon the delivery and acceptance of the deed. The theory of the plaintiffs is that he then knew that the

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title was good, and had good reason to know it, and that he acted upon the knowledge, and accepted of the deed."

No fault can be found with the charge of the court in this respect, if there was any testimony in the case tending to show that Arnold knew that Mrs. Stebbins laid no claim to the farm, and did not intend to do so. The theory of the defendant was that there was to be no delivery of the deed until the abstract was brought down to date, and his attorney, Mr. Bean, could examine the papers, and determine whether the title was good or not. The theory of the plaintiffs was that defendant did not insist that the abstract should be brought down to date, or that Mr. Bean should look it or the papers over, before any delivery took place, but that defendant acted as to the acceptance of the deed upon his own knowledge and information concerning the ownership and occupancy of the Shaw farm, and from that knowledge and information he was satisfied with the title, and believed that Mrs. Shaw was the owner, and relied upon the covenants of warranty in his deed for his protection. Under these theories it was proper to show that Mrs. Stebbins had not lived upon the place, or exacted any rent from the Shaws, or made any claim to any part of the premises, since she executed the quitclaim deed to Mrs. Shaw, and to show that Mr. Arnold was aware of the facts by any competent testimony. The fact that Arnold was a near neighbor to the Shaws, and intimate with them, was a competent fact tending to show such knowledge. It would be of little, if any, weight against his positive denial of such knowledge, but it was competent to go to the jury as a circumstance tending to show knowledge when the plaintiffs made their case. Mr. Boudeman was not justified in claiming such knowledge,

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based on the fact that Arnold had heard Mrs. Stebbins' testimony in the case; but otherwise we do not think he went out of the legal path in his remarks above quoted, and which are complained of. We think there was evidence in the case tending to show that Arnold had knowledge that Mrs. Stebbins claimed no interest in the Shaw farm after she quitclaimed to Mrs. Shaw.

The objection to the cross-examination of the witness Thomas G. Green is not tenable. The defendant put this witness, who made the abstract, on the stand to prove that there was no record of any patent from the United States to Garrett Sickles, under whose will Mrs. Shaw claimed title to the Shaw farm. We can see no relevancy to this testimony, because it clearly appears that the occupancy of the land by Sickles and his grantees had been uninterrupted for 50 years, and Arnold had found no fault with the title in this respect until this witness was sworn; but it was competent, after the admission of such testimony, to show by this same witness why he made the abstract showing title from the government to Sickles, and where he obtained his information of such title.

It was competent for the defendant to accept the deed without its execution by Mrs. Dougherty, upon the understanding and agreement that she should afterwards execute it, and, if he so accepted it, and she afterwards executed it, he cannot be heard to say that it was never delivered to or accepted by him, because he refused to again receive it after such execution. The whole evidence shows that the only interest she acquired in the Shaw farm by this trade was an inchoate right of dower. It was not acquired by her and her husband with any intention of making any part of it a homestead.

The defendant requested the court to instruct the jury

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that this suit was to recover the purchase price of the land, and not for damages for not deeding, and that the fact that Arnold had made the written contract and refused to carry it out would not sustain this action. This was not given as requested, but the counsel for plaintiffs contend that the substance and intent of it was embraced in the general charge of the court. We think the court committed no error in this regard. He fairly put the issue to the jury upon the question whether or not the plaintiffs' deed was delivered to and accepted by the defendant on the 16th of June. If the jury found that it was not accepted, the case was ended, and the contract cut no figure in it. If they found the deed was accepted, then the fact that Arnold had made this contract and refused to carry it out was material and important in the case. Then, under the rule of damages laid down by the court, and sanctioned by this Court when the case was here before, the contract specified the purchase price to be paid in part for said deed, to wit, so much land at $5,700, and so much other land at $100 per acre as would be sufficient, with the $5,700 and the $5,000 mortgage to Richard Dougherty, to make up the whole purchase price of the Shaw farm, to wit, $13,000.

Under the facts, so found by the jury, when Arnold refused to deed the land, or any of it, he had paid but $5,000 towards the land, and that by giving the mortgage to Dougherty, leaving $8,000 unpaid on the Shaw farm, which he had agreed to pay in a certain specified amount of land. This leads us to the question of damages, which we may as well examine here.

When this case was first commenced in the circuit, it was planted upon the idea that the plaintiffs were entitled to recover the amount of the purchase price of the Shaw farm, $13,000, less the Dougherty mortgage, $5,000, to wit, $8,000, with interest from June 16, 1887. A trial

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was entered upon on that theory. Objection was made by defendant's counsel that this was not the proper measure of damages, claiming that it should be the value of the land which Arnold agreed to but did not convey. The circuit judge ruled with the defendant, and under such ruling the plaintiffs' theory of damages was changed to conform to it. It is now strenuously insisted that the plaintiffs cannot recover in this action, as now entered as to damages, because the contracts of the 11th and 16th of June are absolutely void, for the reason that part of the premises mentioned in said contracts is the homestead, and that the same could not be deeded or contracted away without the signature of Mrs. Arnold. Before we enter upon the discussion of this claim, it may be proper to remark that, if it is correct, then suit was properly planted as to damages in the first place. If the deed to the Shaw farm was accepted by Arnold, and the the title passed to him, then, if this contract was absolutely void, as far as the agreement to convey the Arnold land was concerned, the case would stand within the authority of *Nugent v. Teachout*, 67 Mich. 571, 576 (35 N. W. Rep. 254). The defendant would have received and accepted the deed of the Shaw farm under a promise to pay $13,000 for it. In equity and good conscience he would owe the plaintiffs the balance of the consideration of the price or value of the land in money. His refusal to convey would have the effect to rescind the contract, and raise an implied promise to pay for what he had received upon it. In such case the damages would in all probability equal, if not exceed, the damages recovered in this suit, as they now stand; and, considering that the defendant is responsible for the present theory of damages, we should not reverse the case, even if his present position were found to be correct.

But we have once, on the authority of *Pierson v. Spauld-*

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ing, 61 Mich. 90 (27 N. W. Rep. 865), approved the rule of damages laid down by the trial court in this case. That case differs from the present perhaps in two respects: *First*, the contract in that case was conceded to be a valid one; and, *second*, the contract did not indicate that the inventory of the goods, which were to be paid for in part by the land, or the land, were priced in the contract at their cash value; while here it may be said that the contract was invalid, and the land to be conveyed by Arnold was priced in the contract at its cash value, the 25 acres at $5,700, and the balance at $100 per acre. But the contracts are somewhat alike in another respect. In one case there was to be deducted from the land three-fourths of the growing crops thereon, and in the other certain buildings were reserved, and to be removed to the Shaw farm at the expense of the plaintiffs.

But the contract was not void as far as the land was concerned not embraced within the homestead; and, if he had deeded in conformity with it, such deed would have conveyed his title to the excess over and above the homestead. *Stevenson v. Jackson*, 40 Mich. 702; *Dye v. Mann*, 10 Id. 291; *Wallace v. Harris*, 32 Id. 380; *Shoemaker v. Collins*, 49 Id. 595, 597 (14 N. W. Rep. 559). In *Phillips v. Stauch*, 20 Id. 369, where a specific performance was denied in a case where a portion of the premises was a homestead, and the wife did not join in the bond for a deed given by the husband, the bill was dismissed without prejudice to any proceeding at law which the complainant might "be advised to institute upon the bond for a deed mentioned in the pleadings." See pages 381, 384. This, in view of the reasoning of the opinion in the case, is an intimation that the complainant could sue upon the bond at law for damages.

We think the contract was good between Arnold and the plaintiffs. He knew when he made it that he could

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not perform it without the signature of his wife to the deed. He, in effect, bound himself to procure such signature. It in nowise differs in this respect from a contract to sell lands which one does not own at the time he makes such contract. The fact that one did not have the legal title at the time he made the contract, and could not procure it afterwards, has never been recognized as a legal defense to an action for breach of the contract. The rule of damages was the proper one under the declaration in this case, and the theory of the plaintiffs. If the theory of the defense was correct, that the deed was never delivered or accepted, then in this action there could be no damages recovered. This was submitted to the jury, and they found against defendant's theory.

It is assigned as error that the court gave undue prominence in his charge to the testimony of Newton H. Barnard in stating to the jury that the certificate of the acknowledgment of the mortgage from Arnold to Dougherty was not to be lightly overturned by interested witnesses. Arnold denied that he ever acknowledged the mortgage, and there was some other testimony, and some things about the acknowledgment itself, that tended to corroborate his denial. Barnard and other witnesses testified that he did acknowledge it. Barnard was the notary who signed the certificate of acknowledgment. The rule undoubtedly is that the burden of proof rests upon the person denying the acknowledgment to show the falsity of the certificate, which carries with it the usual presumption that the officer making it has certified to the truth, and has not been guilty of wrongful or criminal action. See *Hourtienne v. Schnoor*, 33 Mich. 274; *Johnson v. Van Velsor*, 43 Id. 219 (5 N. W. Rep. 265), and cases there cited.

It is not claimed that Mr. Barnard was a party to any

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fraud in this respect, as we understand from the record, briefs, and oral arguments in this case; but it is contended that he was the attorney of the plaintiffs then as he is now, and also a witness in their behalf, and that this instruction gave too much weight to his testimony, which was given in favor of the truth of the certificate as he made it. This, in our opinion, would not alter the presumption in favor of the certificate. It would have been proper for the court to have charged the jury that the burden of proof was on Arnold to show that he did not acknowledge the mortgage, and we think this would have been better under the circumstances than the language used by the circuit judge, although we are not prepared to say that his charge as given was erroneous.

It is also insisted that the court erred in the measure of damages in that he instructed the jury, if they found for plaintiffs, the damages would be the fair market value of the land, with interest, without stating to them that they should deduct therefrom the value of the buildings reserved, and the cost of moving them to the Shaw farm, and that the damages were, under such charge, made up from the value of the land with the buildings reserved upon it. This last claim is denied by plaintiffs' counsel, who insist that the damages, as found, did not include the value of the buildings.

As the case must go back for a new trial, this matter need not be further examined. The court should, however, upon the new trial clearly inform the jury that the value of the reserved buildings must not be included in the valuation of the land in estimating the damages, and that the cost of moving such buildings from the Arnold to the Shaw farm must be deducted from the value of the land.

We have now examined all the assignments of error

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argued by defendant's counsel in their briefs, except one or two, which do not merit discussion.

The judgment must be reversed, and a new trial granted, with costs of this Court to defendant.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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ALLEN D. CHESEBRO v. JOHN E. POWERS ET AL.

[See 70 Mich. 870.]

Slander of title—Joint liability—Measure of damages—Evidence—Statute of limitations.

1. While it is true that two or more persons cannot as a general rule be held jointly liable for a verbal slander, yet, under circumstances where all are jointly concerned and interested, and participate in the general purpose, such concert and co-operation may be shown, although the false and malicious statements may have been made by one alone. *Haney Manufacturing Co. v. Perkins*, 78 Mich. 1.

2. In a suit for defamation of title by the execution of a deed containing a statement that the plaintiff had fraudulently and without consideration obtained possession of the land described in the deed, and that he pretends to own it, etc., which statement is found to have been malicious and upon no foundation of right whatever, plaintiff should be allowed to make full proof of the acts and conduct of all of the defendants,—they having all participated and actively engaged in the execution and delivery of the deed,—in their continued claim of title under the deed and the recital therein, not only to show their continued claim of pretended rights in the premises, but also their motive in inserting the recital in the deed, and in their pretended claims thereunder.

3. The taxable costs awarded to a party in a suit to remove a cloud upon his title caused by the insertion in a deed of a statement that he had fraudulently obtained possession of the land, which

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he pretends to own, etc., are not the measure of his damages in a suit for defamation of title, but he may recover as damages any other reasonable outlay incurred in removing such cloud,—it appearing that the defendants acted maliciously, and under a claim which they knew to be false, for the purpose of harassing the plaintiff and thereby forcing a settlement.

4. Whether How. Stat. § 8714, limiting actions for slanderous words to two years after the cause of action accrues, applies to an action for defamation of title by the execution of a deed and inserting therein a statement that the plaintiff had fraudulently obtained possession of the land, etc., query? But, if so, the continued claim of rights under the deed, which were settled adversely to defendants in a suit to remove the cloud thereby created less than two years prior to the commencement of suit, will save the action from the operation of the statute.

Error to Kent. (Grove, J.) Argued November 14, 1889. Decided December 28, 1889.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Godwin, Adsit & Dunham, for appellant, contended for the doctrine stated in the opinion.

J. C. FitzGerald (*Charles Chandler* and *Francis A. Stace,* of counsel), for defendants, contended:

1. Taxable costs are the only recompense awarded to a successful litigant to compensate him for the expense of prosecuting a just claim or defending against an unjust and illegal one; citing *Harmon v. Tappenden,* 3 Esp. N. P. 278; *Malden v. Fyson,* 11 Adol. & Ell. (N. S.) 292; *Loton v. Devereux,* 3 B. & Adol. 343.

2. The plaintiff could not recover under the proofs, for no action can be maintained if the acts of the defendants were done in good faith for the purpose of asserting a claim which they at the time believed to be valid, no matter how erroneous and ill-grounded such belief might be; citing *Pitt v. Donovan,* 1 Maule & S. 639, 648; *Smith v. Spooner,* 3 Taunt. 246, 254; *Walkley v. Bostwick,* 49 Mich. 374; *Thompson v. White,* 70 Cal. 135; *Like v. McKinstry,* 3 Abb. App. Dec. 62, 66, 67; *Pater v. Baker,* 3 Man. (Gr. & S.) 831, 868; *Wilson v. Dubois,* 35 Minn. 471.

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3. The plaintiff having instituted and prosecuted to judgment his suit in chancery to be relieved against the act of the defendants in placing the deed and mortgage on record, he cannot now bring this suit at law to recover damages on account of the same act. The chancery court had jurisdiction over the entire matter, and its decree should be final; citing *Chesebro v. Powers*, 70 Mich. 370.
4. Damages for slander of title must be such as naturally and proximately result from the act of the defendants; citing 3 Suth. Dam. 674; *Walkley v. Bostwick*, 49 Mich. 374; *Vicars v. Wilcocks*, 8 East, 1; *Ward v. Weeks*, 7 Bing. 211; *Tutein v. Hurley*, 98 Mass. 211; and special damage is of the essence of the action; citing *Wetherell v. Clerkson*, 12 Mod. 597; *Cook v. Cook*, 100 Mass. 194; *Wilson v. Dubois*, 35 Minn. 471; and the words must be spoken pending some treaty or public auction for the sale or purchase of the property, or the action will not lie; citing Starkie, Sland. (Folkards) § 128.
5. It seems to us that this action cannot be classified as coming under any other head than that of the law of libel, and it has always been so treated and considered in the books; citing Townsh. Sland. & Lib. § 130; Starkie, Sland. (Folkards) § 124; and that the fact that it is not for defamation of character by words actionable *per se* does not affect the general nature of the suit as being one for libel and slander, and therefore barred by the statute; citing How. Stat. § 8714.

LONG, J. There is but little controversy about the facts in this case. The plaintiff's claim in his declaration is that he is the owner of certain real estate in Kent county, of the value of about $5,000, and that the defendants, well knowing the premises, but contriving, and falsely and fraudulently intending, to injure the plaintiff, and cause it to be suspected and believed that he, the said plaintiff, had no title in or to said land, and to spread a cloud upon the title thereto, and to hinder and prevent the plaintiff from enjoying his said estate free from any annoyance on the part of the defendants, and to prevent him from selling, mortgaging, or conveying said property, and to cause and procure the plaintiff to sustain and be put to divers great expense in order to definitely settle and decree his title thereto to be free from such slander

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and cloud and vexation, and to harass, oppress, impoverish, and injure the plaintiff, heretofore, to wit, on September 29, A. D. 1885, at the city of Grand Rapids, in said county, did wrongfully, willfully, maliciously, and injuriously cause to be made, executed, and acknowledged a certain deed, bearing date September 29, A. D. 1885, made by John E. Powers, administrator of the estate of Jonathan Powers, deceased, of the first part, to Mary Elizabeth Powers of the second part, for a consideration named as $4,000, and in which said deed said defendants caused to be inserted, in words and figures substantially as follows, to wit:

"One Allen Chesebro has fraudulently, and without consideration, obtained possession of the within-described land, and pretends to others that he owns it, and is trying to sell it. Said Chesebro withholds from record papers which would, if recorded, compel him to pay for said land as agreed upon between himself and Jonathan Powers, now deceased; otherwise he holds possession through fraud and sharp practice, and against the interests of the heirs of said Jonathan Powers."

Which said recital was wrongfully, willfully, and maliciously false, and which said deed said defendants wrongfully and maliciously caused to be recorded, etc. The declaration also sets out, as of the same date, and from thence hitherto, that said defendants willfully and maliciously asserted and represented to divers persons to the plaintiff unknown that the representations in said deed were true, and that the heirs and representatives of Jonathan Powers, deceased, are the owners of said lands, etc. The further claim is made in the declaration that the plaintiff was compelled to take proceedings in the courts to quiet his title to said lands, and to remove the cloud therefrom, and was put to large expense thereby, and, as incidental thereto, in preparing his said suit, and in seeking to procure, and in procuring, the necessary

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evidence to sustain the same, and to rebut the false and willful misrepresentations held out by said defendants.

The defendants, with their plea of the general issue, gave notice of the statute of limitations as a bar to the action.

On the trial of the cause plaintiff put in evidence the record and proceedings in the chancery cause of *Chesebro v. Powers*, which was decided at the April term of this Court, 1888, and is reported in 70 Mich. 370 (38 N. W. Rep. 283). The facts are fully stated in the opinion of Mr. Justice CAMPBELL in that cause; and the decree made in the court below, removing the cloud from the land of the plaintiff in this suit, who was the complainant in the chancery cause, was affirmed by this Court, with costs.

The present action is brought to recover damages for defamation of title, not only in making and recording the deed with the slanderous words inserted, but also by reason of the false and malicious claims and pretenses of the defendants that the words inserted in the deed were true. In the chancery proceeding the cloud was fully removed from the title of complainant, and his lands decreed to be free and unincumbered of any claim made by defendants, and the complainant awarded his costs, and in both courts. But the claim is made in the present action for, and on the trial plaintiff offered proofs to show, the amount of time and expense he was necessarily put to in looking up witnesses, and preparing his case, and obtaining the decree removing the cloud from his title. Counsel for defendants objected to such proof, on the ground that it was immaterial and irrelevant, and that such proof would not support an action for defaming title. This objection was sustained, and counsel for defendants contend here that the taxable costs in the chancery suit are the only recompense that can be awarded.

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Plaintiff also offered evidence to show that Margaret Powers, in the year 1887, and since the deed and mortgage were made, stated and claimed that plaintiff did not have title, and that duing the year 1887 she attempted to have the land assessed to her; that she stated the plaintiff owed her on the land about $2,600, and that the property was hers. Under objection of counsel for defendants, this testimony was excluded. At the close of the trial the court directed the verdict for defendants, and judgment was entered in their favor. Plaintiff brings error.

The only claim of damages relied upon here is that the plaintiff was put to a large amount of costs and expense in the litigation through which the deed and mortgage were declared void, and the cloud upon the title removed, and for which the plaintiff was not compensated by the taxable costs in that proceeding.

The court was in error in refusing to allow plaintiff to show the statements made by Margaret Powers, and her claim of title to the premises. While it is true that two or more persons cannot, as a general rule, be held jointly liable for a verbal slander, yet, under circumstances where all are jointly concerned and interested, and participate in the general purpose, the concert and co-operation may be shown, although the false and malicious statements may have been made by one alone. The evidence shows conclusively that all the defendants participated and actively engaged in the execution and delivery of the deed and mortgage containing the defamation of title to the lands of the plaintiff, and the evidence offered was competent to show that they continued, after the time of the making and delivery and of the recording of the deed and mortgage, to claim title to the premises, and assert their rights thereunder. Such testimony would not only tend to show the slander, but also

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the willful and malicious claim made under these conveyances. It is not an action for a verbal slander, but one grounded upon the statements contained in the deed, and claims thereafter made from time to time that the recitals in the deed were true. That such claim was made by the defendants for the purpose of compelling the plaintiff to pay for said lands, or to settle their pretended claim, is made apparent from this record. The merits of that controversy were, however, settled by this Court in the chancery case when before us, and need not be discussed here. In that case it was said:

"All of the circumstances favor complainant's claim, and substantiate his case. We are satisfied that he has been in possession, under the foreclosure deed, more than 20 years before defendants undertook to meddle with the land, and that their action was malicious, and upon no foundation of right whatever."

The court below should have permitted the plaintiff, under the claim in his declaration, to have gone fully into the proofs of the acts and conduct of all the defendants, in their continued claim of title under these conveyances, and the recital in the deed, not only to show their continued claim of pretended rights in the premises, but also as showing the motive of defendants in inserting the words in the deed, and the pretended claims thereunder.

The court was also in error in rejecting the testimony offered on the question of damages. The taxable costs in the chancery case may have fallen far short of compensating the plaintiff for all the costs and expenses he was necessarily put to in that proceeding. The rules as to taxable costs limit the amount to be recovered by the prevailing party, and may in many instances fall far short of full and complete recompense for an injury done from bad motives. Whether the defendants were actuated by malice, and wrongfully and willfully asserted the claim

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without just cause or excuse, is a question of fact for the jury. But the court excluded the plaintiff's testimony upon this question. If, upon the proofs, the jury found that the defendants acted maliciously, and under a claim which they knew to be false, for the purpose of vexing and harassing the plaintiff, and thereby compel him to a settlement of a claim which they knew to be wrongful, then the plaintiff would not be limited to his taxable costs, and any other reasonable outlay by him in removing the cloud from his title would be damages for which he could recover. This is not entirely a new question in this State. In *Brand v. Hinchman,* 68 Mich. 590 (36 N. W. Rep. 664), the action was brought to recover damages for falsely and maliciously attaching the property of the plaintiffs, and Mr. Justice MORSE, after a review of the many cases bearing upon the question, said:

"The matter of costs I do not consider a sufficient reason for denying remedy, as the costs, under our practice, awarded the prevailing party, are never sufficient to re-imburse him for the actual cash expenses of the litigation, to say nothing of the loss of time and the inconvenience and trouble suffered."

The action under the proofs offered is not barred by the statute of limitations. The act complained of as constituting the cause of action commenced in 1885, at the time of the execution and recording of the deed; yet, even if section 8714 of Howell's Statutes has application to this form of action, the continued claim of rights in the premises under the deed from that time forth up to within a few months of the commencement of the suit was a continuing grievance, of which plaintiff complains, and the rights of the parties thereunder were not settled until May, 1888.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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CHARLES CURTIS v. PETER LEASIA.

Trespass—Partition fences—Ownership of rails.

Rails placed in a line fence, but upon the land of the adjoining owner, with no intention of leaving them there permanently, are personal property; and in a trespass suit by the grantee of such owner for the removal of such rails, the title to land is not in question, and a plea of the general issue is sufficient.

Error to Saginaw. (Gage, J.) Argued October 31, 1889. Decided December 28, 1889.

Trespass. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

E. L. Beach, for appellant.

Wilber & Brucker, for defendant.

SHERWOOD, C. J. These parties own adjoining lands in the township of Bridgeport, county of Saginaw. The line between their lands is 80 rods long; plaintiff owning on the south side of the line, and the defendant owning on the north side. The defendant, about 30 years ago, moved onto his land, and commenced improving it. Both parcels were at that time unimproved, and open to the commons. In clearing, the defendant, not knowing the exact location of the line, cleared over it in some places several rods, and in others not quite to it; and when he built his fence he took all the rails from his own land, of good oak timber, and fenced in all the land he cleared, thus making a crooked line of fence the whole 80 rods. He built this fence temporarily, expecting at some future time, when the plaintiff's land came to be improved, to get a correct survey of the line, and build

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his half of the line fence. In 1885, when the plaintiff came to occupy the land adjoining, on the south side of the line, the old fence was still standing where the defendant laid it, and the parties met, and had a treaty with each other, by which it was agreed that they would divide the line for the purpose of fencing, and that defendant should build and maintain a partition fence upon the east 40 rods, and that the plaintiff, in like manner, should build and maintain the fence upon the west 40 rods; and it seems to have been understood between them that the defendant was to remove the rails, and build his half of the fence right away, to enable the plaintiff to use and make available about a half acre of clover which the old fence inclosed of plaintiff's land, and that plaintiff was to build his half within a reasonable time thereafter, or as soon as he could get the rails split for that purpose. This last understanding is denied by the plaintiff; but, if the evidence was proper, then it is settled in defendant's favor by the verdict.

Defendant did as he says he agreed; and it is undisputed that he removed the old rails in the east half of the old fence, and with them, and some new ones, built his half of the line fence. Some time thereafter the plaintiff moved a portion of the old fence upon his part of the line, but never built the entire portion of his 40 rods. When the defendant saw that plaintiff had taken the rails in the old fence to build his half of the line fence, the defendant took down the fence, and carried away the old rails, with the remainder of the old rails still remaining in the old fence, and placed them upon his own land. That part of the old fence from which the plaintiff took the rails to build what he did of the line fence stood upon the plaintiff's land, and it was for the value of these last-mentioned rails that plaintiff brought

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this suit in trespass to recover of defendant, before a justice of the peace, where on the trial he prevailed. The defendant appealed the case to the Saginaw circuit, where it was tried before Judge Gage, with a jury; and the defendant had judgment. The plaintiff now brings the case here by writ of error, and alleges 22 errors upon the record, which is a very short one.

In addition to the understanding in regard to the fence, and the other circumstances stated above, on the part of defendant, the record says the defendant also gave further evidence tending to show that the rails in the fence in question were regarded by both the plaintiff and defendant as the sole property of the defendant, and that he had the right to remove the same.

The first nine assignments of error are upon the rulings in taking the testimony in the case; but we think these exceptions are all without merit, and cannot be sustained.

The plaintiff presented five requests for the court to charge the jury. They are as follows:

"1. The plaintiff in this suit claims in his declaration that he is the owner of the land described in his declaration, also 40 rods of rail fence, and that defendant did, on January 7, 1889, commit a trespass by entering upon the land of plaintiff,—broke down and carried away 40 rods of rail fence. Twenty rods of this fence was a line fence that divided the land of plaintiff on the north, and defendant's land on the south. That 20 rods of fence was built entirely upon the land of plaintiff.

"2. Plaintiff claims that he was in possession of the land described, and while he was in possession defendant committed the trespass.

"3. Defendant pleads the general issue, and tenders into court ten cents, and the costs that had been made at the time the parties appeared in justice court.

"4. I charge you that the rail fence in question was a part of the realty; that it belonged to the farm.

"5. Under the pleadings and the proofs in this case, the plaintiff is entitled to the value of the fence that

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was upon the land described in the declaration before defendant took it away."

These requests suggest the theory of the plaintiff upon the trial at the circuit, and the same points are relied upon here, which is that the pleadings admit that the title and possession of the land upon which the rails in question were laid up into a fence were in the plaintiff, and that the fence, being a part of the realty, was at the time defendant took the rails the property of plaintiff, and therefore, on making proof of the value of the rails taken, he should have been allowed to recover. As between vendor and vendee, this is undoubtedly correct, if nothing to the contrary appears to have been said when the sale was made. But, even as between these parties, by an agreement they may become personalty; and it is claimed by defendant that such was the effect of the stipulation in the case. Ordinarily, that which is permanently attached to the freehold is a fixture, and is to be regarded as a part of the land. Trees, when severed from the soil, cease to be a part of the realty; and when such trees are manufactured into rails the rails are personalty. And it is only where they are laid up into fence permanently, or when they have been hauled along a line upon which it is intended to place them in a fence permanently, that they can be held to pass by a sale of the realty; and even then the vendor must own the rails at the time he makes his conveyance, or they will not pass. The reason why fences are held to pass with the conveyance of the land is because they are a necessity to good farming, which is the staple interest of the country, and because of the great expense in building them. In this case the defendant owned these rails. The plaintiff never did. It is true they were laid up into fence upon the plaintiff's land, but with no intention on the part of the owner of the rails of leaving them there

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permanently, or of letting the plaintiff or his grantors have them; and the plaintiff never in any manner acquired title to them. The title to land was not in question in the case, but simply the title to the rails; and the defendant's plea was sufficient.

When persons own adjoining lands in the country, which they both use for farming purposes, it becomes the duty of such adjoining owners to erect and maintain a good and sufficient fence in equal parts between them; and if either neglects or refuses so to do the law will compel him to observe and perform such duty. Chapter 21, How. Stat. If, however, one of the parties fails or neglects to build his part of the fence, and the other does not compel the failing party to build his part, but goes forward, and builds it himself, without a resort to the aid the statute provides, the rails he uses in so doing are his own, and his adjoining neighbor acquires no right or interest in them through his neglect to perform his duty. Neither does the person building such fence, if he, without intent to commit trespass, places the same accidentally a few feet over the line upon his neighbor, incur a forfeiture of any of his property to such negligent neighbor, but may reclaim his rails at his pleasure. Nor in obtaining them, if done in a careful manner, will he subject himself to an action of trespass by the other party; for the reason, the fence being one for partition, he has the right to go upon his neighbor's land, not exceeding the necessary and ordinary use in constructing line fences. The rules herein laid down apply equally where a person is improving a farm adjoining wild and unimproved lands by an agreement in writing with the owner of such unimproved land as to the division and maintenance of such fence. How. Stat. § 812.

It will be seen that, the plaintiff's theory of his case being wrong, all of his requests based upon that theory

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are incorrect; and inasmuch as, upon the plaintiff's testimony, he has no cause of action against the defendant, it is entirely unnecessary to discuss the charge given by the court, or the assignments of error relating thereto.

The tender made by the defendant is of no consequence in the case. It was made, evidently, with a view of preventing or limiting a recovery of costs against him, under circumstances that could never arise in the case, on the facts appearing in the record.

The judgment at the circuit must be affirmed, with costs of all the courts.

MORSE, J., concurred with SHERWOOD, C. J.

CHAMPLIN, J. I concur in the result reached by the Chief Justice; but, as I do not think that the law relative to partition fences is involved in the merits of the controversy, I withhold my opinion upon that question.

CAMPBELL, J., concurred with CHAMPLIN, J. LONG, J., did not sit.

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JOHN MCKELLER v. THE TOWNSHIP OF MONITOR.

Negligence—Public highways—Proximate cause of injury—Bridges—Notice of defect to township—Contributory negligence—Charge to jury—Statutory construction.

1. Where, by the breaking of a bridge which a township had failed to keep in repair, the water and steam from a boiler attached to an engine which the owner is hauling over the bridge escapes, and injures his horses, the breaking of the bridge is the proximate cause of the escape of the steam and water, and if the township is otherwise liable it is liable for such damage.

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2. Where, in a suit for damages sustained by reason of the breaking of a bridge-stringer, the jury find that to all outward appearance the stringer was sound, but was rotten internally, in the absence of personal knowledge on the part of the proper officers of the hidden defect, the question for the jury is whether said officers used due diligence in discovering such defect, and neglected to do that which common prudence and caution required them to do to ascertain the true condition of the stringer. *Medina v. Perkins*, 48 Mich. 67; *Blank v. Livonia*, 78 Id. ——.

3. In charging a jury in a negligence case the court should distinguish between the negligence which *caused* the injury and that which *contributed* to it.

4. The first clause of section 4 of Act No. 264, Laws of 1887, which provides a remedy for the failure of townships to keep highways in repair, limits the right to bring suit under the first and second sections of the act, for personal injury and injury to property, to public highways which have been in use for *ten* years.

5. The duty imposed upon townships by section 3 of Act No. 264, Laws of 1887, to keep their highways in reasonable repair, etc., may be enforced by information or indictment where the highway has *not* been used as a public highway for *ten* years, but a personal action for damages will not lie in such cases.

Error to Bay. (Cobb, J.) Argued November 14, 1889. Decided December 28, 1889.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

A. McDonell, for appellant, contended:

1. The measure of damages is the difference between the real value of the horses before and after the injury; citing *Davidson v. Railroad Co.*, 49 Mich. 428.

2. The court erred in not distinguishing between the diligence that should be exercised in case of a seldom-traveled side road, and a main one which is constantly thronged; citing *Medina v. Perkins*, 48 Mich. 67.

3. If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the dam-

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age are not sufficiently conjoined or concatenated as cause and effect to support the action; citing Addison, Torts, 6; *Marble v. Worcester*, 4 Gray, 395; *Anthony v. Slaid*, 11 Metc. 290; *Silver v. Frazier*, 8 Allen, 382; Cooley, Torts, 69.

4. According to the ordinary course of events, it cannot be said that the township had notice that people driving teams over that bridge carried steam and boiling water in their vehicles, which would naturally scald the team in case of a defect in the bridge. In any event it would be a question for the jury; citing *Fairbanks v. Kerr*, 70 Penn. St. 86-91; *Alston v. Herring*, 11 Exch. 822; *Harrison v. Berkley*, 1 Strob. 529.

Hatch & Cooley, for plaintiff, contended:

1. The recent decisions of this Court sustain the charge; citing *Medina v. Perkins*, 48 Mich. 67.
2. Previous knowledge of the township officers should be taken into account; citing *Woodbury v. Owosso*, 64 Mich. 239; and a liability may arise in the absence of such knowledge, a want of which may, under given circumstances, imply want of due care; citing *Stebbins v. Keene*, 60 Mich. 214; *Dotton v. Albion*, 50 Id. 129.
3. Locomotives haul hot water over the country. This Court has decided that a self-propelling agricultural steam-engine has a right to go along a highway; citing *Macomber v. Nichols*, 34 Mich. 212.

CHAMPLIN, J. A public highway in the township of Monitor crosses Culver creek upon the section line between sections 20 and 21. About nine years before the accident below mentioned, a bridge had been erected over the creek, and has been maintained there since. On September 22, 1887, the plaintiff was hauling a steam-boiler filled with hot water, and steam-engine attached, with a span of horses over this bridge. On nearing the south end, he drove so far to the east side that the whole weight of the load rested upon the east stringer, which broke, and the load and horses were precipitated into the creek. The fall broke one of the try-cocks off from the boiler, and the hot water and steam escaped, and came in contract with the horses, and injured them by scalding. The

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horses also suffered other injuries. The same engine and boiler had been drawn over the bridge about two weeks before, and had again crossed the bridge in the forenoon, and plaintiff was on his return when the accident occurred.

The defendant's counsel requested the court to instruct the jury that the township was not liable for damages arising from injury to the horses from the scalding of them by the hot water and steam, and also that it was negligence on the part of the plaintiff to have hot water or steam in the boiler. The court refused this request, but instructed the jury as follows:

"Some discussion has been had in your presence of the proposition that defendant is not liable for any damage done to the horses by the steam or hot water, but only for such other damages as were done,—the straining and scratching. But I charge you that, if the defendant is liable at all, it is liable for that damage as well as the rest. The plaintiff was under no obligation to empty his boiler before he started, and he had a right to a road on which he could safely travel with it as it was."

The question is a very close one, but we think that the breaking of the bridge was the proximate cause of the escape of the steam and water from the boiler, and that, if defendant is liable in other respects, it is liable for the damage caused by the escape of the steam and hot water.

There was evidence which tended to show that the stringer which broke was rotten, and had been in place about nine years. It was a red oak stick 11 inches in diameter, and when the accident occurred was still enveloped with bark. Some of the witnesses testified that it was very rotten, from an inspection of it after the accident, and one testified that it was rotten in the center, but was sound to the depth of an inch or more around the outside. The overseer of highways testified that he

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inspected or examined this stringer about two weeks before the accident, and that it appeared to be sound, and he did not discover any defects therein. There was no direct testimony of actual knowledge or notice to the township of the defect in question.

The circuit judge charged the jury as follows:

"But another witness, who was the overseer of highways of the township, says that at a certain time he examined the bridge, and examined this particular stringer, and he has told you what he found. I do not recollect myself the exact time that he says he made this examination, but you will probably recollect it. In your judgment, did that overseer then find the bridge to be reasonably safe and fit for travel? If not, he then and there had notice; that is, if the bridge was then unsafe and unfit for travel, and he was there for the purpose of making an examination, and did make an examination, as he says, of course the township then and there had notice that it was unsafe and unfit for travel. I say, if that was so, and he was making that examination, he had that notice, and so the town had. If this timber was so rotten as to be unsafe at the time of the accident, then was it probably safe and sound at the time he saw it? Was it possible for the timber to be as safe as he says it was when he saw it, and then to be as rotten as the other witnesses say it was when it broke? Is it possible that the stick was then rotten, or that it was then sound? Was his examination careful and thorough? If you come to the conclusion that the stick was sound when he saw it, then it follows, of course, that from that examination he got no knowledge or notice that would bind the township,—no notice or knowledge of any unsoundness. But, if it was then rotten, he ought to have found it out, and it was negligence in him, and it was negligence in the township, not to find it out. If the stick was rotten, and he examined it for rot, he and the township had notice of its rottenness, whether he found it or not. If an oak log of that size, and exposure to view, is so rotten as to be unsafe for use, anybody that exercises ordinary prudence and care and good judgment can find it out, if he tries."

The circuit judge in this portion of his charge pretty

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effectually impeached this witness, and we think lost sight of the other testimony that to appearances the stringer was sound upon the surface. If the jury believed that it did so appear upon the surface, then, in the absence of actual knowledge or notice, the question would be whether they had used due diligence in discovering the defect, and neglected to do that which common prudence and caution required them to do to ascertain the condition of the timber. *Blank v. Township of Livonia,* 78 Mich.—(44 N. W. Rep. 157); *Township of Medina v. Perkins,* 48 Mich. 67 (11 N. W. Rep. 810).

It was claimed that the plaintiff was guilty of contributory negligence in driving so heavy a load too far to the east side of the bridge. The circuit judge held that, if he did so unnecessarily,—and he left the facts to them to determine under the testimony,—he was guilty of negligence; and if they found that the injury occurred through his negligence, and not through the negligence of defendant, he could not recover. He nowhere instructs them that if they found defendant was negligent, and such negligence caused the injury, the plaintiff could not recover if his own negligence contributed to the injury. We think the jury may not have understood the court upon the question of plaintiff's negligence, as he failed to distinguish between negligence which caused the injury and negligence which contributed to it.

The court was requested to charge the jury that, unless they found that the road in question was used as a public highway for 10 years before the accident, they could not give a verdict for the plaintiff. The court, after repeating this request, said

I charge you that that is not the law, and that you have no question of that kind to consider at all."

Section 4 of Act 264, Laws of 1887, reads as follows:

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"The provisions of this act shall not apply to public highways which have not been in use ten years; but nothing in this section shall be construed as exempting townships, villages, and cities from maintaining their streets, bridges, sidewalks, cross-walks, and culverts, and the approaches to bridges, in a safe condition for public travel."

The act comprises six sections. The first gives a remedy to any person who has sustained bodily injury upon any public highway by reason of the neglect to keep the same in reasonable repair. The second gives a remedy to the owner of any animal or other property which receives injury by reason of the neglect by any township, etc., to keep the highway in repair. The third section enjoins the duty upon townships, etc., to keep in reasonable repair the highways, etc. The fourth section has been quoted above. The fifth confines the remedies for injuries received from the neglect to keep the highways in repair to those given by the act, and abrogates all common-law liability. The sixth repeals certain former statutes.

A correct interpretation of the fourth section requires us to hold that the first clause of the fourth section withholds the remedy given by the first and second sections as to all public highways which have not been in use 10 years; at the same time, by the latter clause, the duty imposed by section 3 applies to all highways, whatever the length of time they have been in use as public highways. This duty can be enforced by information or indictment, but a suit for redress for injuries received for such neglect by a private person cannot be maintained unless the highway has been in use as a public highway 10 years. This remedy did not exist in Michigan until it was given by this statute, and the Legislature, in bestowing a new remedy, may surround it with such restrictions

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as they deem proper.' Except as noted above, the charge was a very clear and fair statement of the law.

For the errors mentioned the judgment will be reversed, and a new trial granted.

The other Justices concurred.

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MELVIN E. VANDUSEN v. FRANCIS LETELLIER ET AL.

Master and servant—Safe place to work—Inspection—Negligence—Fellow-servants—Delegation of master's duty—Respondeat superior—Evidence—Res gestae.

1. The duty of inspection, when required by the circumstances of the case, cannot be delegated by the master in such manner as to avoid responsibility.

So *held*, where a firm of lumber-manufacturers,—none of the members of which undertook to personally supervise the manufacture of lumber at the point where the mill was located, and all of whom resided in another county,—employed a general foreman or superintendent who was to look after the sawing of the lumber and in a general way the entire business, who employed competent men to inspect the docks upon which the lumber was placed preparatory to piling, and the posts and stringers supporting the same, one of which docks fell by reason of the breaking of one of said posts, which was weakened where the stringer was mortised in by reason of dry-rot not visible on an outward inspection of the post,—the mortise being covered by a plank which was not removed at time of inspection,—and injured an employé, who was awarded damages for the injuries thus sustained.

2. The following propositions are summarized from the opinion of Mr. Justice MORSE, in which LONG, J., concurred:

a—The circuit judge was right in instructing the jury that, if the defendants themselves could have discovered the defect in the dock—the fall of which injured plaintiff—by exercising reasonable care and diligence, they were responsible, notwithstanding they had employed skillful and competent persons to

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look after the docks, and had furnished them with the proper materials for repairing the same.

b—It is well settled by all of the authorities that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work; and it is his duty to keep such machinery and appliances in good repair. If he cannot do this personally he must provide some other person to take his place in this respect, and the person to whom this duty is delegated,—no matter what his rank or grade, or by what name he may be called,—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants.

c—In order to keep such machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections and examinations; and he cannot escape responsibility by delegating this duty to one who, in other respects, may be a fellow-servant of the person injured by the failure to properly perform this duty. *Swoboda v. Ward*, 40 Mich. 420; *Mining Co. v. Kitts*, 42 Id. 39; *Parkhurst v. Johnson*, 50 Id. 70; *Ryan v. Bagaley*, Id. 179; *Huizega v. Lumber Co.*, 51 Id. 272; *Smith v. Car Works*, 60 Id. 502; *Marshall v. Furniture Co.*, 67 Id. 167.

d—From all the circumstances of the case, it was for the jury to determine whether the inspection, as made, was made at the particular spot where the post broke, and whether, if made there, it was a sufficient inspection to look at it, or sound it with a hammer or other instrument, without tearing off the plank which was nailed over the mortises and tenons, or without cutting or boring into the wood.

e—It was not error for plaintiff to show what wages he commonly earned, but it was not proper to show that he had no other means of support than day-labor, which fact was immaterial to the issue, and an indirect way of bringing the poverty of plaintiff before the jury, which is not permissible in actions of this character. *Marsh v. Bristol*, 65 Mich. 383.

f—An admission by defendants' vice-principal of knowledge, before the accident, of the particular defect causing it, made the next day and away from the place where it happened, is inadmissible. *Railroad Co. v. Coleman*, 28 Mich. 440; *Ruggles v. Fay*, 31 Id. 141; *Mabley v. Kittleberger*, 37 Id. 360; *Gates v. Boom Co.*, 70 Id. 309; *Patterson v. Railway Co.*, 54 Id. 92; *Stebbins v. Township of Keene*, 55 Id. 552; *Wormsdorf v. Railway Co.*, 75 Id. 476.

Error to Osceola. (Judkins, J.) Argued November 14, 1889. Decided December 28, 1889.

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Negligence case. Defendants bring error. Reversed. The facts are stated in the opinion.

J. C. FitzGerald (Charles Chandler and *Francis A. Stace,* of counsel), for appellants, contended:

1. Personal negligence is the gist of this action, and in order to recover the plaintiff must show affirmatively by competent evidence that the defendants were guilty of such negligence. He must show that the docks were not inspected in a reasonably careful manner, and that such want of careful inspection was in consequence of the negligence of the defendants; citing *Railroad Co. v. Judson*, 34 Mich. 506; *Mining Co. v. Kitts*, 42 Id. 34; *Brown v. Railway Co.*, 49 Id. 153; *Henry v. Railway Co.*, Id. 495; *Mitchell v. Railway Co.*, 51 Id. 236; *McPadden v. Railroad Co.*, 44 N. Y. 478; *Malone v. Hathaway*, 64 Id. 5.

2. The mere fact that the dock fell in consequence of the timber composing it being defective is not evidence of negligence in the defendants; citing *Railroad Co. v. Kirkwood*, 45 Mich. 51; *Henry v. Railway Co.*, 49 Id. 495; *Warner v. Railway Co.*, 39 N. Y. 468.

3. An employer is not an insurer nor guarantor of the safety of his employé; citing *Batterson v. Railway Co.*, 49 Mich. 184; *Beaulieu v. Portland Co.*, 48 Me. 291; *Railway Co. v. Troesch*, 68 Ill. 545; *Caldwell v. Brown*, 53 Penn. St. 453; *Slater v. Jewett*, 85 N. Y. 61.

4. Negligence cannot be presumed, but must be affirmatively proved, and in the absence of proof the presumption is that the master has done his duty; citing *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Judson*, 34 Id. 506; *Foley v. Railway Co.*, 48 Id. 622; *Brown v. Railway Co.*, 49 Id. 153; 3 Wood's Railway Law, § 392.

5. Evidence, to be sufficient, must be of such a character that a jury may therefrom reasonably and properly conclude that there was negligence; a mere *scintilla* of evidence, or evidence from which a jury may surmise that there was negligence somewhere, is not sufficient; citing *Beaulieu v. Portland Co.*, 48 Me. 291, *Baulec v. Railroad Co.*, 59 N. Y. 356; *Cotton v. Wood*, 8 C. B. (89 Eng. C. L.) 566.

6. The submission of an action for negligence to a jury is not authorized where the evidence on the part of the plaintiff is equally consistent with the absence as with the existence of negligence, as in such case the evidence fails to establish neg-

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ligence; citing *Ellis v. Railway Co.*, L. R. 9 C. P. 551, and two cases last above cited.

7. Plaintiff was bound to prove that the defect which caused the accident was known to the defendants, or that they could have ascertained it by the exercise of reasonable care, and not having done this he cannot recover; citing *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Huntley*, 38 Id. 537; *Warner v. Railway Co.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 Id. 5; *Faulkner v. Railway Co.*, 49 Barb. 324; *Smith v. Railway Co.*, 42 Wis. 520; *Provision Co v. Hightower*, 92 Ill. 139; *Riley v. Steamship Co.*, 29 La. Ann. 791.

8. Having used ordinary or reasonable care in the selection of trustworthy men, and furnished them with suitable means to perform the services in which he employed them, the master is not answerable for injury received by an employé in consequence of the negligence of his fellow-servants engaged in the same service; citing *Smith v. Railway Co.*, 46 Mich. 258; *Hoar v. Merritt*, 62 Id. 386; *Malone v. Hathaway*, 64 N. Y. 5; *Johnson v. Tow-boat Co.*, 135 Mass. 209.

9. If there was any negligence in the failure to discover and repair the defect, it was the negligence of the dock inspector and repairers, who were fellow-servants of the plaintiff, for which defendants are not liable; citing *Davis v. Railroad Co.*, 20 Mich. 105; *Railroad Co. v. Dolan*, 32 Id. 510; *Mining Co. v. Kitts*, 42 Id. 34; *Railroad Co. v. Smithson*, 45 Id. 212, 217; *Railroad Co. v. Gilbert*, 46 Id. 176; *Greenwald v. Railroad Co.*, 49 Id. 197; *Sell v. Lumber Co.*, 70 Id. 479.

10. All the witnesses in the case who attempt to describe this defect agree that it was in such a place as to be entirely hidden, and not to be discovered by ordinary means of inspection, and, it being actually unknown to defendants, no cause of action exists; citing *Warner v. Railway Co.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 Id. 5; *Railway Co. v. Troesch*, 68 Ill. 545; *Provision Co. v. Hightower*, 92 Ill. 139; *Smith v. Railway Co.*, 42 Wis. 520; *Morrison v. Construction Co.*, 44 Id. 405.

Charles A. Withey (*Ransom Cooper*, of counsel), for plaintiff. Brief confined to a discussion of the testimony, and review of cases cited by defendants' counsel.

MORSE, J. The plaintiff, on May 8, 1888, was severely injured by a fall, while in the employ of the defendants, sorting lumber at their mill in Rose Lake, Osceola county.

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He had been working for them but one day and a half. The mill-yard was furnished with a number of docks connected with the mill. These docks were arranged in parallel lines, running north and south, and connected by two or more cross-docks, and having tramways on the ground below and between them. These docks were about 12 feet wide, and from 7 to 16 feet high from the ground. They were on a level with the platform of the mill at the end where the lumber came from the saw. They were built of timber, and covered with two-inch plank. As the lumber was sawed, it was loaded upon carts, and wheeled out upon these docks. It was sorted and distributed along the sides of the docks opposite and above the piles on the ground, ready for the pilers, who took it from the docks, and piled it on the spaces along the tramways, when it could readily be loaded on the tram-cars.

At the time of his injury the plaintiff was engaged in wheeling lumber from the mill, pushing the cart before him, loaded with green hemlock plank, upon one of the central docks, known as "Dock 6." Another cart also loaded with hemlock plank, was being pushed ahead of him by a young man named Henry Oakes. On the sides of this dock, waiting for the pilers, was an unusually large quantity of lumber, which had been placed there during the day by the plaintiff and others; and this had accumulated to a large amount at the place where the accident occurred. There was also at this place a short plank, accidentally left by some one, and which did not belong there. The wheel of Oakes' cart struck this short plank, and shook up and disarranged Oakes' load, so that he had to stop and straighten it up. This stopped the cart of plaintiff, who went forward, and helped Oakes to re-arrange his load. As plaintiff stepped back to his own

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cart, and was about to start it, the dock gave way, and the plaintiff fell with it.

The negligence alleged in the declaration is that, at the point where the plaintiff was injured, the defendants had grossly, carelessly, and negligently allowed the posts, timbers, and braces of which the dock was constructed to become rotten and in a dangerous condition, and without the knowledge of the plaintiff, or notice to him. The plaintiff recovered a verdict and judgment for the sum of $3,250.

There is no claim of any contributory negligence on the part of the plaintiff; but defendants' counsel strenuously insisted on the trial, as they now insist here, that there was not a particle of evidence tending to show any negligence on the part of the defendants. It is claimed that the portion of the dock that fell was built only about five or six years before the accident; that it is not contended by plaintiff that the dock was improperly constructed; and that it was clearly proved, without any contradiction, that it was built of sound material, and in a good and substantial manner. The mill and docks were built by Kellogg & Sawyer. The defendants purchased the property in January, 1886.

It is contended that the proofs show that at the time of the purchase they made a careful and particular examination of the docks, and all were found to be in a safe, good condition, and sound; and that they have ever since kept and employed men whose duty it was to inspect the docks, and keep them in repair, and have always provided sufficient and suitable materials for that purpose. That no charge is made by plaintiff that the persons so employed to inspect and repair the docks were incompetent, untrustworthy, or in any way unfit for the duty assigned them; and that it was proven without contra-

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diction that they were careful, competent, skilled, and trustworthy. That this dock, where the injury occurred was, within a few days of its falling, examined by one of these men, Mr. Reasner, and as careful and thorough an inspection made as was possible without taking it to pieces. No defect was discovered. That the dock would not have given way had it not at the time been overloaded with a great quantity of lumber, coupled with the further fact that it had a concealed defect, which could not possibly have been discovered without the taking of the dock to pieces. That there is no evidence tending to show that either of the defendants or their foreman, Hadden, had any notice of this hidden defect, and that the proofs show they had no such notice. Upon this claim of facts, the court below was requested to take the case from the jury and to direct a verdict for the defendants.

The dock was built upon posts inserted in or resting upon mud-sills at the ground. These posts were of pine, 6 by 8 inches, and the mud-sills 6 by 8, 6 by 10, and 8 by 8. The stringers were 6 by 10. They were halved at the post where they joined together, and the post was tenoned to the two halves clear through, and a plank nailed on the outside to prevent their hauling apart. On each side of the post were braces, 4 by 4, from the stringers to the post, which were mortised and tenoned in. There were also other braces, which made the support of the docks sufficient and safe as long as the material was sound of which they were composed.

It appears from the testimony on the part of the plaintiff that the cause of the falling of the dock was the breaking of the stringers and posts sustaining the floor of the dock at the place where the plaintiff and the others stood; that the stringers and posts were rotten where the

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stringers were mortised or tenoned into the posts. At least one stringer and one post, where the stringer was tenoned in, on the east side of the dock, were broken on account of rottenness at the place where they were mortised together. This rottenness was described by some of the witnesses as "a sort of dry-rot." None of the plaintiff's witnesses saw this rottenness until after the break, and they do not state whether this rottenness extended to the surface of the timber so that it was discernible. On the part of the defendants, it was shown that, where the break occurred, only one post broke, and that on the east side of the dock; that it broke where the stringer was mortised in, and broke off the stringer where it was tenoned; that this was occasioned by dry-rot on the inside of the timber; and that the outside looked as good as any of the timber in the dock; and that this dry-rot could not have been discovered by an examination of it, without cutting or boring into it. The evidence on both sides tends to show that planks were nailed over these tenons or mortises, and that water would run in there, and be likely to cause dry-rot.

The defendants contend that the proof is indisputable that the portion of the dock that fell was built in 1882 or 1883, but upon this point we think there is a conflict of testimony; and, while the weight of it is certainly with the defendants, the trial court or this Court would not be authorized to base any legal assumption upon it. It is true, however, as claimed by defendants, that the defect or rottenness of the particular post and stringer which caused the injury could not have been ascertained by an ordinary inspection of the eye alone. The outside of the timbers presented no appearance of the decay or dry-rot within; but it is also true that, at the point where the post and stringer gave way from this rottenness, the timbers were concealed from view by the

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plank nailed across and covering the mortise. This was a place where the rot would be apt to set in, and the question arises whether any adequate inspection could be made without taking off these planks. This was not done by the persons whose duty it was to inspect and repair the docks. But the evidence on the part of the defendants tended to show that they kept skilled and competent men, whose duty it was to examine these docks, and repair them; that the defendants were seldom present at the mill, and had no knowledge of any defect or rottenness in the timbers of the dock. The circuit judge charged the jury that the persons so employed to inspect and repair these docks were fellow-servants of the plaintiff, but refused to instruct them as requested by defendants' counsel in their ninth request:

"If you find from the evidence in the case that a short time before the accident occurred, and before the defendants commenced to use said docks for the wheeling and piling of lumber in the spring of 1888, they caused said docks, including the dock in question, to be examined and inspected by proper and competent persons, whose duty it was to carefully examine and inspect the said docks as to their condition of repair, and the soundness of the timbers and materials composing the same, and their condition as to safety, and being of sufficient strength for the purpose for which they were used, and to support the lumber and materials to be piled thereon, and the men and carts to be used thereon, in the ordinary and usual manner of using the same, and to put the same in a state of good repair, and in such a condition that the same should be safe, and of sufficient strength to support such lumber, materials, men, and carts; and if the defendants afterwards and continually kept in their employ a competent and proper person, whose duty it was to inspect and examine said docks, and to keep them in safe condition, and provided sufficient and suitable means and resources for that purpose, —then I charge you that the defendants had performed their duty, and were not guilty of negligence, and the plaintiff cannot recover, even if yon should find that the

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accident occurred through the negligence of the persons who were employed to make such inspection."

The nearest he came to it was in the following language, in speaking of the defendants' requests:

"No 11 is given: 'If you find that the defendants did not have actual knowledge of the decayed condition of the timber in the dock in question'—I have modified this in this way, slightly—'and could not have discovered it by exercising reasonable care and diligence, and that they employed proper and competent persons, whose duty it was reasonably to examine and inspect their docks, including the dock in question, and to put them and keep them in a safe condition, and that defendants provided suitable means for that purpose, the defendants in that case had performed their entire duty towards their employés, so far as the safety of the docks is concerned, and plaintiff cannot recover'—that is, in case they had no knowledge, and could not have knowledge in the exercise of reasonable care."

He also refused the fifteenth request of defendants, in this same connection:

"The defendants were not bound personally to examine and inspect the docks. They performed their entire duty in that regard if they selected with reasonable care, and employed, suitable and competent persons so to do."

It will be seen that the circuit judge was of the opinion, and so instructed the jury, that, if the defendants themselves could have discovered this trouble with the dock by exercising reasonable care and diligence, they were responsible, notwithstanding they had employed skillful and competent persons to look after these docks, and had furnished them with the proper materials for repair. In this I think he was right.

It is claimed by defendants' counsel that the proofs show that none of the defendants undertook to personally supervise the running of the mill or the manufacture of lumber at this point; that they were seldom there; and that, therefore, if they had employed competent and suit-

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able men to look after these docks, and to see that they were kept in safe repair for the uses to which they were put, they had performed their duty in the premises in that regard, as they had always furnished sufficient and suitable materials for such repair. And the counsel rely upon *Hoar v. Merritt*, 62 Mich. 386 (29 N. W. Rep. 15); *Smith v. Potter*, 46 Id. 258 (9 N. W. Rep. 273); *Davis v. Railroad Co.*, 20 Id. 105; *Quincy Mining Co. v. Kitts*, 42 Id. 34 (3 N. W. Rep. 240); and other cases.

It is well settled by all the authorities that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself, personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade; no matter by what name he may be designated—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants. Such person is an agent, and the rules of law applicable to principal and agent must apply. He is generally called in the law a "vice-principal." In order to keep the machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections and examinations; and he cannot escape responsibility by delegating this duty to one who, in other respects, may be a fellow-servant of the person injured by the failure to properly perform this duty. In the present case, if the duty to repair these docks, and keep them in a safe condition, was imposed upon Reasner, or any other employé of the defendants, such employé, as far as this part of his employment and duty was concerned, was not a fellow-servant with plaintiff, but was the agent or vice-principal of the defendants, and

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standing in their shoes. See 7 Amer. & Eng. Cyclop. Law, under head of "Fellow-Servants," pp. 824–830, inclusive.[1]

This duty of the master has been recognized by our own decisions. *Parkhurst v. Johnson*, 50 Mich. 70 (15 N. W. Rep. 108); *Huizega v. Lumber Co.*, 51 Id. 272 (16 N. W. Rep. 643); *Swoboda v. Ward*, 40 Id. 420; *Smith v. Car Works*, 60 Id. 502 (27 N. W. Rep. 662), *Quincy Mining Co. v. Kitts*, 42 Id. 39, 40 (3 N. W. Rep. 240); *Marshall v. Furniture Co.*, 67 Id. 167 (34 N. W. Rep. 541); *Ryan v. Bagaley*, 50 Id. 179 (15 N. W. Rep. 72).

If the master can delegate this duty to an employé, and apply the doctrine of fellow-servant to such employé because he is working in and about the same business, and in the same general line of such business, as in this case, the manufacture and piling of lumber, then the employer is permitted to shirk his duty upon another, and then allowed to escape all responsibility and liability upon the plea that the person injured is the fellow-servant of his delegate or agent. The law, as I understand it, will not permit this. It is a duty the master owes, which he cannot delegate to a fellow-servant of his employés. If he picks out one of the men working about this mill, and imposes upon him the duty of seeing that the machinery is kept in safe repair, or delegates to one of the men working in the mill-yard the duty of seeing that these docks are kept safe and sound, these men, as far as these duties are concerned, stand in the place of their employer, and their negligence is his negligence. *Rodman v. Railroad Co.*, 55 Mich. 57 (20 N. W. Rep. 788); 59 Id. 395 (26 N. W. Rep. 651); *Slater v. Chapman*, 67 Id. 523 (35 N. W. Rep. 106); *Baldwin v. Railway Co.*, 75 Iowa, 297 (39 N. W. Rep. 507); *Capper v. Railway*

[1] See *Harrison v. Railroad Co.*, 79 Mich. —— (44 N. W. Rep. 1034).

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Co., 103 Ind. 305 (2 N. E. Rep. 749); *Railway Co. v. Herbert*, 116 U. S. 642 (6 Sup. Ct. Rep. 590); *Railroad Co. v. Jones*, 30 Kan. 601 (2 Pac. Rep. 657); *Ford v. Railroad Co.*, 110 Mass. 241; *Luke v. Mining Co.*, 71 Mich. 364 (39 N. W. Rep. 11).

The cases cited by the defendants' counsel, in this State, do not touch this question, except in the instances I shall note. In *Mining Co. v. Kitts, supra*, it is laid down as strongly as possible that the master is responsible for negligence in the general supervision of his business,—

"Whether the supervision be by the master in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, *or in any one to whom the master may see fit to intrust his superintending authority.*"

What is afterwards said as to the position that Wagner occupied, holding him to be a fellow-servant of Kitts, the person injured in that case, upon which defendants' counsel rely as supporting their theory, was not necessary to the decision of the case, as the court found that there was no evidence that Wagner was negligent; and I cannot follow the *dictum* of the judge who wrote that opinion, if it is to have the construction here claimed for it. If it is to be regarded as the law of this State, then all that the master has to do, in order to relieve himself of the responsibility of negligence in the general supervision of his business, is to split or divide up this general supervision among his employés, having one look after and control one branch of the business, and another some other part of it, and thereby make each the fellow-servant of all the rest of the persons in his employ.

In *Smith v. Potter*, 46 Mich. 258, it was held that the brakeman injured was a fellow-servant of the car inspectors employed by the road to see that the cars transferred

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from one road to another were in a proper condition. This appears to have been based on the fact that the statutes of this State make it the duty of any railroad to receive and forward cars of other roads impartially and diligently, and that the business required the employment of many servants beyond the possible constant supervision of either the employer, or of any representative held in law to personate him, and that the duties of the car inspectors were of no different nature from that of other persons employed by the road, such as conductors and brakemen. It is expressly stated in the opinion, at page 264, that the duty of these car inspectors was—

"Not a duty of management or general supervision, but a task for which nothing is required but fidelity, and mechanical knowledge of a comparatively limited kind."

This certainly is not the case at bar. The safety and soundness of these docks, upon which scores of men were working at every hour of the day, was certainly a matter of the greatest importance in the management and supervision of this business. To hold that negligence in this respect is not negligence in the supervision and management of the business is to hold that there can be no such negligence in any case, and to relieve the master of all liability or responsibility for the safety of his employés, if he is only sharp enough to divide up the supervision of his business among his employés, and keep away from the business himself, so that he can acquire no knowledge of the actual condition of things.

In *Gardner v. Railroad Co.*, 58 Mich. 584 (26 N. W. Rep. 301), the case was really decided by a majority of this Court upon the ground that the plaintiff was injured in going into a place and at work in violation of orders not to do so. This disposed of the case, and what is said by Mr. Justice SHERWOOD in that case as to fellow-

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servants was not involved in the case as ruled; and, if it were, it is in the same line as the reasoning in *Smith v. Potter*, *supra*, and cannot apply to the case before us. There is nothing in this case on account of the magnitude of the business that prevented the defendants from personally inspecting these docks, or from delegating such duty to some person who must stand in their places.

The case of *Hoar v. Merritt*, 62 Mich. 386, is the strongest case in defendants' favor, but in that case the majority of the Court held that the painter who was injured had no business to go upon the scaffolding which fell, without ascertaining whether it would hold him, as it was not built for his use, and he was not invited to go upon it. This, again, was decisive of the case, without any finding as to fellow-servants. But that case is not the present one by any means. Merritt employed men to build his house, and furnished proper and suitable materials for so doing. This scaffold was not built or maintained by him. It was not a permanent structure, —a part of the daily business,—but a temporary thing, put up by the carpenters for their own use in building the cornice. "They were the persons most interested in building it safe and strong." The defendant Merritt had nothing to do with its construction in any way.

But here these docks were a part of the plant of the mill when it was purchased by the defendants. It was a place where they ordered men to go to work. They recognized, when they bought the property, that it was their duty to keep these docks in a safe condition, and Mr. Friant testifies that he made a personal inspection of them immediately after he bought them. The plaintiff had a right to suppose that these docks were safe when he went upon them, and I know of no rule of law anywhere that imposed upon him the risk that some fellow-servant, like Reasner, whose chief duty was to look after

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the lumber piles, but who was also charged to "keep an eye out" on the docks, and to repair them when it was necessary, might be negligent in his duty as to such repairs. He had a right under the law, as it exists everywhere, in my opinion, to rest upon the duty of the master to furnish a safe place in which, or on which, to work, which duty could not be delegated to a fellow-servant.

There is also another aspect of the case which sustains the charge of the judge. There was a foreman or general superintendent of the business at this mill, Mr. Hadden, who certainly, under the testimony, stood in the place of the defendants. Mr. Friant testifies that Hadden's business there was to look after the sawing of the lumber, and in a general way the entire business. That he represented them when they were not there, in a "limited way." He employed the men, fixed their wages, and discharged them whenever he chose to, and had control of all the men there, except the book-keeper. He controlled Mr. Boyd, the "yard boss," but could not discharge him, as he was hired directly by the defendants. Hadden directed the work, and had a general discretion as to what should be done. It is evident that Hadden was a vice-principal at the mill. His knowledge was the knowledge of the defendants, and his opportunities of knowledge were their opportunities. His negligence was their negligence. Mr. Hadden was at the mill daily. It was his duty, as vice-principal, to see that these docks were in a safe condition, and not dangerous, and it was his duty to know their condition; and the court was justified in instructing the jury, in effect, as above quoted, that, if the defendants could have discovered this defect in the docks by exercising reasonable care and diligence, they were liable, as Hadden's failure to exercise such care and diligence would be the failure of defendants to do so.

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It was claimed by plaintiff's counsel that Friant's own account of the inspection he personally made of the docks at the time he purchased, or soon after, was not a thorough, competent, and proper inspection; and I think, from his testimony, plaintiff was entitled to go to the jury upon this claim. He admits he did not make a "close inspection." They make the same claim as to the inspection made by all the persons, Boyd, Braddock, and Reasner. I think they were also entitled to go to the jury on these inspections. Something depends, of course, upon the age of this particular dock. The plaintiff's evidence tended to show that it was built in 1875, and defendants' that it was constructed anew in 1882 or 1883. But, from all the circumstances of the case, it was for the jury to determine whether the inspection, as made, was made at this particular spot, and whether, if made there, it was a sufficient inspection to look at it, or sound it with a hammer or other instrument, without tearing off this plank, which was nailed over the mortises and tenons, or without cutting or boring into the wood. If built in 1875, there would, of course, be a greater necessity of being particular, beyond the mere sight of the eye, than if it were built in 1882. But the whole question was one for the jury, and not for the court. There was, then, no error in submitting the facts to the jury for their determination.

It was not error for plaintiff to show what wages he commonly earned, but it was not proper to show that he had no other means of support than day-labor. It was immaterial to the issue, and an indirect way of bringing the poverty of plaintiff before the jury, which is not permissible in actions of this character; and we cannot say it may not have been prejudicial to defendants. See *Marsh v. Bristol,* 65 Mich. 383 (32 N. W. Rep. 645); also *Chicago v. O'Brennan,* 65 Ill. 160.

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There was no error in permitting the plaintiff, on his redirect examination, to state the occasion of the discontinuance of his wages by the defendants, and what was said on such occasion by Mr. Hadden, the foreman of defendants. The matter of wages being paid him by the defendants after the injury, and the subsequent stoppage of such wages, was drawn out by defendants' counsel on cross-examination, and the testimony objected to was proper in explanation thereof. Hadden was the agent of defendants in the fixing of wages for the men, and he was authorized to discharge any of the employés. Therefore he was in the direct line of his agency, as far as this conversation was concerned, and it related to a present transaction in which he was then engaged as such agent, and was not a narrative of some past transaction or occurrence.

Adam Oakes, the father of Henry Oakes, against objection, testified that the next day after the accident Mr. Hadden came to his house, and said:

"'Adam, it looks like a real hospital in your house.' I said: 'Yes; it is too bad.' 'Well,' he said, 'I have been to Leroy, and seen the doctor, and I told him to fetch the boys out all right.' I says: 'It is pretty bad for me. I sent the boy for to earn something, and the boy runs there, and he got hurt.' He said: 'We have been fixing these docks right along, but we hadn't got to this place yet.' He said it was all right; he would see me again; and he went home, and I never saw him."

This testimony tended to show, if admissible, that Hadden had knowledge of the defective condition of these docks, and was repairing them, but had not, in such repairs, yet reached the place of the accident. If Hadden had made this statement at the time of the accident, or immediately following it, it might have been admissible as a part of the *res gestæ*, but it was made the day after, and away from the mill, and was a statement of a past

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transaction. If at this time, at Oakes' house, Hadden had distinctly stated that he had knowledge, before this accident, of the particular defect in the timbers of this dock which caused its fall, such statement would not have been admissible, under frequent decisions of this Court. *Mabley v. Kittleberger*, 37 Mich. 360; *Patterson v. Railway Co.*, 54 Id. 82 (19 N. W. Rep. 761); *Stebbins v. Keene Tp.*, 55 Id. 552 (22 N. W. Rep. 37); *Gates v. Boom Co.*, 70 Id. 309, 318 (38 N. W. Rep. 245, 249); *Mich. Cent. Railroad Co. v. Coleman*, 28 Id. 440; *Ruggles v. Fay*, 31 Id. 141; *Wormsdorf v. Railway Co.*, 75 Id. 476 (42 N. W. Rep. 1000).

There was no error in admitting testimony as to the condition of the dock before the accident, including the weaving or trembling testified to by Lothrop.

The last witness sworn on rebuttal by the plaintiff, Sylvester Clark, testified that one or two days before the accident he notified Mr. Braddock that dock No. 6 was unsafe. Braddock replied: "You boys are more scared than hurt about that dock." And that about five minutes before the accident he again told Braddock that it was not safe, and that Braddock made substantially the same reply. This testimony was offered in impeachment of Braddock, who had testified that they had no knowledge of any defect in the dock, and whose attention was called to this conversation with Clark. The court refused to charge the jury, as requested by defendants, that if the jury found that this notice was given to Braddock, yet that it would not be notice to defendants, or bind them in any manner. The admission of the evidence, and the refusal to charge as requested, are assigned as error, on the ground that Braddock was a fellow-servant of plaintiff, and therefore a notice to him would not be notice to defendants. The court instructed the jury that Braddock, who was the foreman of the mill-yard, was a

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fellow-servant of the plaintiff. But Mr. Braddock himself testified that his business there was to see that the docks were in repair, or to put them in repair, as well as to superintend the yard; that Mr. Reasner, whose especial duty it was to repair these docks, was under his immediate supervision; and this is not disputed by defendants, but conceded. In such cases, as already stated, in my opinion, Mr. Braddock, as far as the supervision of these docks was concerned, was the agent of defendants, and could not be in this respect a fellow-servant of the plaintiff, although he may have been such fellow-servant in other respects, as to which it is not necessary here to determine.

The court was mistaken in holding that any man whose duty it was to see that these docks were kept in reasonably safe repair was a fellow-servant of plaintiff in such a sense that the negligence of such person would not be the negligence of defendants. Therefore notice to Braddock, who had the supervision and control of this matter, was notice to the defendants.

It is also claimed that the charge of the court is open to the objection that it made the safety of the premises the test of the performance of the defendants' duty, without any qualification whatever; and that if the jury found that the dock was, as a matter of fact, unsafe, the defendants were liable, no matter what was their care and diligence. I do not so read the charge. The jury were instructed that if the defendants did all that a prudent man would have done to keep the dock reasonably safe and secure, and were without fault in this regard, the verdict must be in their favor; and I find nothing in the charge, at any place in the record, militating against or qualifying this instruction, The jury were also told, in the language of the defendants' request:

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"7. The defendants were not insurers of the safety of the persons whom they employed to work upon their docks; and, if the accident occurred without actual fault on their part, the plaintiff cannot recover.

"8. Defendants cannot be charged with negligence in not discovering a defect in the dock which could not be ascertained by ordinary care or inspection.

"10. If you find that the dock in question was defective by reason of decay of the east stringer, or by reason of decay of any of the timbers thereof, and that such decayed condition of the timber was not apparent, and not to be discovered by the ordinary methods of inspection, and the defendants did not have actual knowledge or notice thereof, then, in that case, defendants cannot be charged with negligence, and plaintiff cannot recover."

It is also objected that the tenor of the charge of the court was to instruct the jury that it was the duty of defendants to exercise reasonable care and skill in maintaining the dock at the point of the accident to the standard of reasonable safety; and, if need be, for that purpose it was their duty to frequently inspect, examine, and test its strength sufficiently; and in effect instructed them that such examination or testing must be done by them personally, or that, if they delegated this work to others, they would be liable for the negligence of such persons. Under the views already expressed, there was no error in this; and I have been unable to find any error in the charge of the court prejudicial to defendants. In my view of the law of the case in relation to the doctrine of fellow-servants, the charge of the court was too favorable to the defendants.

For the errors noted the judgment must be reversed and a new trial granted, with costs to defendants.

LONG, J., concurred with MORSE, J.

SHERWOOD, C. J. I concur in the result.

CHAMPLIN, J. I do not think the duty of inspection, when such inspection is required by the circumstances of

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the case, can be delegated by the master in such manner as to avoid responsibility, and I concur in reversing the judgment.

CAMPBELL, J. I agree in reversing the judgment, but I do not think it proper to throw doubt on our previous decisions which have dealt with the questions in this cause.

I have not discovered anything indicating negligence in the defendants in this case; and I think that business cannot be conducted on a large scale on the doctrines which my Brother MORSE has expressed as his personal views.

ALICE M. HUNN, ADMINISTRATRIX, ETC., v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Railroad companies—Negligence—Train dispatchers—Vice-principal—Contributory negligence of fellow-servant—Evidence—Mortality tables—Damages.

1. A train dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a "fellow-servant" with other employés acting under his orders.[1]

   So *held*, where, by reason of the failure of a train dispatcher to notify one of two engineers of the meeting point established for two engines, and to order one of them held at such point, a collision occurred, and the fireman on one of the engines was killed; and in a suit to recover damages under the statute the railroad company defended on the ground that the train dispatcher and fireman were fellow-servants.

2. Contributory negligence to defeat a right of action must be that of the party injured.

[1] See *Van Dusen v. Letellier*, 78 Mich. 492; *Harrison v. Railroad Co.*, 79 Id. — (44 N. W. Rep. 1034).

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So *held*, where the court was requested to charge the jury that although they might find the defendant guilty of negligence, yet, if the fellow-servant of the deceased contributed to produce his death, the plaintiff could not recover, which request is held to have been rightly refused.

3. Where in a railroad negligence case the defendant claims contributory negligence of the fellow-servant of the deceased in running the trains in violation of the rules of the company as to speed, testimony is admissible on the part of the plaintiff tending to show that a strict compliance with the rules was impracticable, and that they were obeyed as nearly as possible and run the trains on the schedule time fixed by the company.

4. The mortality tables contained in How. Stat. § 4245, show the probable life expectancy of a healthy person, whose age is given, but are not conclusive evidence; and when offered in connection with proof of the physical condition of the deceased at time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from *all* of the testimony before them such probable duration of life had the deceased not died as a result of the injury complained of.[1]

5. Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of damages awarded is beyond the reach of a writ of error.

6. Evidence of the pecuniary means of the husband at time of his death is inadmissible in a suit to recover damages for the loss sustained by such death, alleged to have been caused by the negligence of the defendant.

7. A declaration which states a cause of action and is not demurred to is sufficient after verdict.

8. The following propositions are summarized from the opinion of Mr. Justice CHAMPLIN:

a—This Court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negligence of a fellow-servant while engaged in a common employment. *Railroad Co. v. Leahey*, 10 Mich. 193; *Davis v. Railroad Co.*, 20 Id. 105; *Railroad Co. v. Dolan*, 32 Id. 510; *Railroad Co. v. Austin*, 40 Id. 247; *Mining Co. v. Kitts*, 42 Id. 34; *Day v. Railway Co.*, Id.

[1] See *Rajnowski v. Railroad Co.*, 74 Mich. 21 (head-note 7), excluding such tables where the deceased was under ten years of age.

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523; *Railroad Co. v. Smithson*, 45 Id. 212; *Railroad Co. v. Gilbert*, 46 Id. 176; *Smith v. Potter*, Id. 258; *Henry v. Railway Co.*, 49 Id. 495; *Greenwald v. Railroad Co.*, Id. 197; *Ryan v. Bagaley*, 50 Id. 179; *Gardner v. Railroad Co.*, 58 Id. 590.

b—Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined *who* are fellow-servants, in such sense as to shield the master for the negligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence.

c—The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego* (another self), and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself.

d—It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his own employés through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons.

e—Whenever the business conducted by a person selected by the master is such that he is invested with full control (subject to no one's supervision except the master's) over the action of the employés engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employés to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls. *Mining Co. v. Kitts*, 42 Mich. 39.

Error to Jackson. (Peck, J.) Argued October 31, 1889. Decided December 28, 1889.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

Gibson & Parkinson (*H. M. Campbell* and *Ashley Pond*, of counsel), for appellant.

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Hammond, Barkworth & Cobb (*Thomas A. Wilson*, of counsel), for plaintiff.

[The points of counsel are so fully stated, and the authorities bearing upon the questions involved so fully reviewed, in the opinion, that a restatement from the briefs of counsel is omitted.—REPORTER.]

CHAMPLIN, J. About 3 o'clock on the morning of December 30, 1885, engine No. 120, with a way-car, under the charge of W. D. Loomis as conductor, and Samuel Maitland as engineer, and George Hunn as fireman, left Bay City, going south, with orders to run wild to Rives Junction, over the Jackson, Lansing & Saginaw Railroad, leased and operated by the defendant company. On the same morning engine No. 177, without any train, was proceeding north over the same road, under the charge of Nelson Napier as conductor, Robert Mills, engineer, and Thomas Looney, fireman. Both engines were run under orders by telegraph from one Kilmer, a train dispatcher, of Bay City. It was the duty of Kilmer, as train dispatcher, to establish a meeting point for these two engines, under a rule adopted by the defendant company, which reads as follows:

"Rule 133. When an order is given by telegraph for two or more trains to meet at a station, the train dispatcher must first order the green signal displayed at such meeting point by the operator, and receive assurance from him that the signal has been displayed before giving orders to either train. In ordering one train held for another, the dispatcher will order each train held for the other."

Kilmer established such meeting point at Saginaw City, and notified engine No. 120 of that fact, but neglected to notify engine No. 177, and gave no order to hold this engine at that point. Napier, the conductor of 177, reached Saginaw City and saw the green signal, and found

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the order there to hold W. D. Loomis, conductor of No. 120, but no order for himself. He received his clearance, and proceeded north three or four miles, and met engine No. 120, upon a curve, at about 3:20 A. M. The respective engines were running at from 10 to 12 miles an hour. The collision resulted fatally to Hunn. At the time a thick fog was prevailing, the night was dark, and the view at the curve was obstructed by houses and other objects, which prevented the approaching engines from being seen from each other a distance of from three to four car-lengths. The accident occurred within the limits of the Saginaw yards. The time card rule, which was well known to all employés of the company, required that—

"Trains will run carefully, and under full control, through all yards, and irregular trains must keep sharp lookout for switching engines."

The plaintiff recovered a judgment in the court below, and the defendant asks its reversal upon several grounds, the principal of which are the following:

1. The declaration was insufficient, in not setting forth with more particularity the duty of the defendant, the breach of duty which caused the accident, and the cause of the accident.

2. The only negligence proved upon the trial was that of the train dispatcher, and no recovery can be had, for the reason that his negligence was that of a fellow-servant.

3. The testimony relative to damages, and the charge of the court in reference thereto, were erroneous.

The declaration was not demurred to. It states a cause of action, and is sufficient after verdict.

The second ground above stated, if sustained, prevents a recovery in the action, and raises the most important point in the case. This Court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negli-

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gence of a fellow-servant while engaged in a common employment. *Mich. Cent. Railroad Co. v. Leahey,* 10 Mich. 193; *Davis v. Railroad Co.,* 20 Id. 105; *Mich. Cent. Railroad Co. v. Dolan,* 32 Id. 510; *Mich. Cent. Railroad Co. v. Austin,* 40 Id. 247; *Quincy Mining Co. v. Kitts,* 42 Id. 34 (3 N. W. Rep. 240); *Day v. Railway Co.,* Id. 523 (4 N. W. Rep. 203); *Mich. Cent. Railroad Co. v. Smithson,* 45 Id. 212 (7 N. W. Rep. 791); *Mich. Cent. Railroad Co. v. Gilbert,* 46 Id. 176 (9 N. W. Rep. 243); *Smith v. Potter,* Id. 258 (9 N. W. Rep. 273); *Henry v. Railway Co.,* 49 Id. 495 (13 N. W. Rep. 832); *Greenwald v. Railroad Co.,* Id. 197 (13 N. W. Rep. 513); *Ryan v. Bagaley,* 50 Id. 179 (15 N. W. Rep. 72); *Gardner v. Railroad Co.,* 58 Id. 590 (26 N. W. Rep. 301). The rule is a salutary one in all cases of fellow-servants where the master has exercised due care in the selection of competent employés, and has become pretty generally recognized by the courts of last resort in this country. But the question of who are fellow-servants still perplexes the judicial mind, and gives rise to a great diversity of opinion. Some courts go so far as to hold that, if the master exercises due care in selecting employés, his full duty towards his servants is discharged, even though he selects one or more agents to represent him in overseeing, controlling, and carrying on the business, however large and extended it may be, if he retains the right of employing and discharging his servants. Others hold that so long as they are employed and paid by the same master, and are engaged in a common enterprise, they are fellow-servants. But this is the extreme, and denies substantially all liability of the master in a vast majority of cases where enterprises of any considerable magnitude are carried on.

Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined who are fellow-servants, in such sense as to shield the master for the neg-

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ligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence. The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego*, and the master is as responsible for his acts of omission and commission, while engaged in the business entrusted to him, as if he did such acts himself. It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his employés through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons. Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the employés engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employés to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls. In *Quincy Mining Co. v. Kitts*, 42 Mich. 39, this Court said:

"This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and, if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master

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is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority."

It was upon this principle that in *Ryan v. Bagaley*, 50 Mich. 179, this Court held the owner of a mine liable for the negligence of the mining captain. The question was made to turn upon whether the mining captain was intrusted with the management of the mine without interference. If he was, in respect to legal accountability, his negligence was the negligence of the defendant.

It now becomes pertinent to inquire what the duties of Kilmer, the train dispatcher whose negligence caused the death of the fireman, Hunn, were. The division superintendent's name was W. A. Vaughn. In receiving dispatches from the train dispatcher, the conductors and engineers never act upon them unless signed with the initials "W. A. V." Dispatches delivered by the operator so authenticated were considered authoritative, and were acted upon. Mr. Haire, was the chief train dispatcher at Bay City, and he had six train dispatchers under his supervision in the Bay City office, only one of whom, however, was on duty at a time. He testified that the train dispatchers signed the initials "W. A. V." to their dispatches, and were authorized to do so, and that the division superintendent, Mr. Vaughn, never sees them at all, and knows nothing about them, and does not even know the instructions in regard to train dispatchers. He was asked:

"*Q.* Who has the control of trains on the Jackson, Lansing & Saginaw division, or who did have at the time of this accident?

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"*A.* Mr. Kilmer, in regard to moving them backwards and forwards; the entire charge at that time; nobody else has any right to interfere."

He further testified that no more than one person has control of the trains at any one time, and no other train dispatchers would have the right to interfere, not even the division superintendent, or the superintendent or the president of the company, unless they wanted to relieve the train dispatcher themselves. If they wanted to take his program, and sign it, by these orders they could do so; they have the authority. They would have to receipt for it, and take upon themselves the duties. Rule 124 of the company reads as follows:

"The general and assistant general superintendent, the division superintendents, and the train dispatchers on duty are the only persons authorized to move trains by special order, and but one person on the same circuit shall be permitted to move trains by special order at the same time."

Rule 127 is as follows:

"The train dispatcher on duty will have full power to run any train or engine by telegraph that he may think proper. No irregular train or engine will be allowed to run upon the road, either upon a single or double track, without his knowledge and instructions, unless they can follow a regular train under a red flag, and then only to a station where they can obtain an order," etc.

Mr. Vaughn, the division superintendent over this division of defendant's road, testified as follows:

"*Q.* Do you do the dispatching or the giving of orders for the running of trains upon the road?

"*A.* I don't.

"*Q.* In the system of doing business upon your road, what persons—I do not refer to their names—but what persons have charge in telegraph management of trains,—had at that time.

"*A.* The train dispatcher.

"*Q.* When a train dispatcher is engaged in the duty of

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dispatching trains upon the line, what other persons have rights or powers there, so far as interfering.

"*A.* No other."

It is thus seen that the train dispatcher has absolute control over the division of the road from Rives Junction to Mackinaw, so far as the running and operating of trains thereon is concerned. It is his province to direct, and it is the duty of all employés operating trains to obey. This is the most important branch of the railroad service, and is the highest exercise of the franchise conferred upon railroad corporations. It is the corporation who does it, through the train dispatcher. This officer by rule 124 above quoted, is ranked with the general, the assistant, and the division superintendents, and by rule 127 he is given supreme control. To say that such an official, exercising such control, is a fellow-servant with those whom he directs, ignores all distinctions between master and servant. If his act is not the act of the master, then no railroad corporation ever run or operated a railroad.

In *Darrigan v. Railroad Co.*, 52 Conn. 285, there were two irregular trains, going in opposite directions, on the western division of defendant's road, which were run as directed by telegram from the train dispatcher in the division superintendent's office at Hartford. He ordered the east bound train to run to Waterbury until 6 o'clock. Soon after, he was relieved, in the regular course of business, by an assistant, who, a little before five o'clock, sent an order to the west-bound train at Waterbury to run to Brewster's. In obeying this order the trains collided, and the plaintiff was injured. The negligence of the train dispatcher was admitted, but it was claimed by the defendant that such negligence was the negligence of a fellow-servant. In deciding this question, the court said:

"It is immaterial that these men are hired and paid

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by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service."

And the court further said:

"Cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience,—some one must hear and obey. * * * It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. * * * Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them, —a train dispatcher, acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience."

The case of *Smith v. Railway Co.*, 92 Mo. 359 (4 S. W. Rep. 129), was very similar to the one under consideration, and the supreme court of Missouri held, after a consideration of authorities, that the railroad company was liable for the negligence of its train dispatcher which resulted in the death of one of the servants of the company. The following cases are to the same effect: *Sheehan v. Railroad Co.*, 91 N. Y. 332; *Booth v. Railroad Co.*, 73 Id. 38; *Railway Co. v. Henderson*, 37 Ohio St. 552; *Washburn v. Railroad Co.*, 3 Head, 638; *Railroad Co. v.*

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McLallen, 84 Ill. 109; *Railway Co. v. Dwyer*, 36 Kan. 58 (12 Pac. Rep. 352); *Railway Co. v. Ross*, 112 U. S. 377 (5 Sup. Ct. Rep. 184); *Phillips v. Railway Co.*, 64 Wis. 475 (25 N. W. Rep. 544); *Railroad Co. v. Kanaley*, 39 Kan. 1 (17 Pac. Rep. 324); *McKinne v. Railroad Co.*, 21 Amer. & Eng. R. Cas. 539; *Gravelle v. Railroad Co.*, 10 Fed. Rep. 711; *Gilmore v. Railroad Co.*, 18 Id. 866; *State v. Malster*, 12 Reporter, 783; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Malone v. Hathaway*, 64 N. Y. 5; *Moran's Case*, 44 Md. 283; *Flike v. Railroad Co.*, 53 N. Y. 549; *Dobbin v. Railroad Co.*, 81 N. C. 446; *Cowles v. Railroad Co.*, 84 Id. 309; *Dowling v. Allen*, 74 Mo. 13.

In holding that the train dispatcher is not a fellow-servant with the fireman, I do not consider that I run counter to the doctrine so often recognized by this and other courts, in relation to fellow-servants, in which, broadly stated, it is said:

"It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, though the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object."

This cannot be applied when the superior causing the injury represents the master, and it is always a subject of inquiry to ascertain the nature and extent of the authority of the superior whose negligence caused the injury. If his authority and duties are such as the master must necessarily, either personally or by another, exercise and discharge, then the above rule does not apply. There are some authorities which hold that a train dispatcher, and those operating trains under his control, are fellow-servants. It seems to me, however, that those authorities do not give sufficient prominence to the posi-

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tion which the train dispatcher occupies in operating a railroad. He is the corporation for the time being, and exercises powers which neither the superintendent, nor the president, nor any other officer or agent of the corporation, can interfere with.

The defendant requested a charge to the effect that, although the jury might find the defendant guilty of negligence, yet if the fellow-servant of deceased contributed to produce his death the plaintiff could not recover. This request was rightly refused. The correct rule, and the reason for it, is stated in *Paulmier v. Railroad Co.*, 34 N. J. Law, 155, as follows:

"The servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that where such negligence contributes to the injury the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured." *Railway Co. v. Cummings*, 106 U. S. 700 (1 Sup. Ct. Rep. 493); *Keegan v. Railroad Corp.*, 8 N. Y. 175; *Railroad Co. v. Swett*, 45 Ill. 197; 2 Thomp. Neg. 981; *Perry v. Lansing*, 17 Hun, 34; *Busch v. Railroad Co.*, 29 Id. 112; *Gray v. Railroad Co.*, 24 Fed. Rep. 168.

The second count of the declaration was based upon the negligence of defendant in employing an incompetent train dispatcher, and quite an amount of testimony was introduced in the case in the effort to prove that fact. But this count, upon an intimation of the court, was practically abandoned. The defendant insists that the testimony introduced under that count remained in the case, and was prejudicial to it. We do not see anything in the testimony upon this branch of the case that could have possibly prejudiced the jury. The testimony introduced tended to show the capability of Kilmer, and the

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care and caution exercised by defendant in selecting him for the position. Its tendency was favorable to the defendant.

Under defendant's claim of contributory negligence of fellow-servants running the trains in violation of the rules of the company as to speed, testimony was admitted by the court tending to show that a strict compliance with the rules was impracticable, and that they were lived up to as nearly as they could be, and the trains run on the time allowed by the schedule prepared by the company. We think it was competent to show what was usually and habitually done in the running of trains, because, if the company permitted or had so framed the rules as to require the employés to exercise some discretion in the matter of strict obedience, it ought not to be permitted to hold its employés to the very letter of the rule in order to shield the company from liability for what it had tacitly permitted. But the admission of such testimony could not harm defendant, if it was the company's negligence that was the proximate cause of the injury, although a concurring cause was the negligence of a fellow-servant in running at a greater rate of speed than the rules allowed. The court gave full effect to the rules in his charge to the jury, so far as they were material, by instructing the jury that—

"If you find, as a matter of fact, that the collision resulted entirely from the negligence of one or both of the engineers of engines No. 120 and 177, the defendant is not chargeable with the consequence of that negligence."

There was testimony introduced tending to show that the deceased was earning $900 a year at the time of his death, and was 27 years of age. A witness was then introduced, and he was permitted to testify that he had made a computation of the present value of an annuity

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based upon the expectancy of life of a man of the age of 27 years on an income of $900, and that its present value was $10,725.30. The court also, against defendant's objections, permitted the mortality tables found in section 4245, How. Stat., to be admitted in evidence, and the Northampton tables for showing the present value of a dower interest or of an annuity, found upon page 242 of Cheever's Probate Law. Mrs. Hunn also testified that her husband's earnings were her only means of support; that he owned a place at the time worth about $2,000. She was also permitted to testify, against defendant's objections, that there was an incumbrance upon the place of $1,100 or $1,200.

There was also considerable testimony introduced as to his physical health, and as to his being afflicted with varicose veins, and varicose tumors, and how such disease would impair his health, or affect the probable duration of his life. Upon the question of damages the court, among other things, instructed the jury as follows:

"Now, in estimating her pecuniary loss, you should consider the personal character of her deceased husband, as shown by the evidence; his mental and physical capacity; his habits as to industry, economy, or otherwise; his health,—whether at the time of his death he was afflicted with any disease, or physical infirmity, as varicose veins, which would be likely to reduce his earning power in the future, or shorten his life; consider his capacity, disposition to earn money, as shown by the evidence; the salary he was then earning, and the amount, whether greater or less, which, under the testimony, you think he would, with reasonable probability, be likely to earn in the future; the probable length of time he would continue to live and earn money, and furnish his wife with support, or other pecuniary advantages; and for this purpose you may consider the evidence of the mortuary tables, or expectancy of life, given you from the statute by Mr. Birney, considering, in the same connection, how much that natural expectancy for the life of a man might be reduced by the circumstances of his physical infirmity of varicose

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veins, as shown by the evidence. But you must not consider Mr. Birney's computation, based upon the annuity tables, of how much money it would take to purchase an annuity, as testified to by him. That evidence I understand to have been withdrawn from your consideration. At all events, gentlemen, you will give it no weight in determining you verdict. These, and all other facts, conditions, and circumstances appearing in the evidence, which tend to throw light upon or aid you in reaching a fair and just conclusion as to the amount of her pecuniary loss, you may and should consider in making up your verdict. Now, the pecuniary benefits which Alice M. Hunn would, with reasonable probability, have realized, by being his wife during the length of time that relation would have continued if he had lived, she has lost by his death; and these benefits, fairly and justly estimated by you with reference to their pecuniary value, under all the evidence in the case and the instructions I have given you, will furnish the measure of her pecuniary injury in this case. The question is not what he might have earned or saved if he had lived, but it is what she, as his wife, would have realized if his death had not occurred from the collision."

The mortuary tables contained in Howell's Statutes were properly admitted in evidence, as some testimony tending to show Hunn's expectancy of life at the age of 27. *Balch v. Railroad Co.*, 67 Mich. 394 (34 N. W. Rep. 884). Such tables are not conclusive. They show the probable age which a healthy person may expect to reach, whose age is given. But when that is before the jury, and the physical condition of the person at the time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from the testimony before them the probable duration of decedent's life had he not died as a result of his injury.

The testimony of Birney was properly excluded, and the jury told not to regard it. His figures showed the value of Hunn's life to be $10,725.30.

The jury found the plaintiff's damages to be $7,575, and this sum the defendant's counsel insist is excessive.

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Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of the damages awarded is beyond the reach of a writ of error.

The court erred in admitting testimony showing the extent of their means, and the incumbrance upon the land. When the question was objected to, the court said he would admit it as showing the extent of their means. In *Chicago & N. W. Railway Co. v. Bayfield*, 37 Mich. 214, Mr. Justice COOLEY says:

"What the family would lose by the death would be what it was accustomed to receive, or had reasonable expectation of receiving, in his life-time; and to show that the family was poor has no tendency towards showing whether this was, or was likely to be, large or small. One man contributes liberally in aid of his poor relations, another delights in contributing luxuries where comforts are already abundant, but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by a poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent, whether the loser be rich or poor."

We cannot say that this testimony did not influence the jury. It was admitted as having some bearing upon the measure of damages, and it must be presumed that it formed an element in the estimation of damages by the jury.

The instruction to allow merely nominal damages, so far as the brother and sisters were concerned, was correct. *Railroad Co. v. Shannon*, 43 Ill. 338; *Railroad Co. v. Swett*, 45 Id. 205.[1]

[1] The court instructed the jury that under the evidence no basis was furnished to justify them in finding any substantial sum as damages for the brother or sisters.

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For the error pointed out the judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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WILLIAM B. VAN BRUNT, ADMINISTRATOR, ETC., v. THE CINCINNATI, JACKSON & MACKINAW RAILROAD COMPANY

Railroad companies—Negligence—Damages.

The "fair and just damages" which the jury are authorized to assess against a railroad company, in a suit under How. Stat. § 3392, must have reference to the *pecuniary* injury resulting from the death which is the basis of the action.

Error to Calhoun. (Hooker, J.) Argued October 31, 1889. Decided December 28, 1889.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

John C. Patterson and *Jesse M. Hatch*, for appellant.

Miner & Southworth, for defendant.

[The points of counsel and authorities cited are stated in the opinion.—REPORTER.]

MORSE, J. William H. Van Brunt, the plaintiff's intestate, while in the employ of the defendant as brakeman on a freight train, was crushed between defendant's caboose car No. 86 and caboose car No. 88, on January 1, 1888, at Marshall, and died from his injuries on the

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next day, about five hours after the injury. The administrator brought suit to recover damages on account of such injury and death. The court below directed a verdict for the defendant. The court based its direction, among other things, upon the ground that no damages were shown.

The declaration was in four counts, in each of which it was alleged that the claim for damages was expressly based upon sections 7 and 8 of article 5 of an act entitled—

"An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities, of all railroad and other corporations owning or operating any railroad in this State,"—

Approved May 1, 1873, as amended, and also pursuant to an act entitled—

'An act requiring compensation for causing death by wrongful act, neglect, or default,"—

Approved February 12, 1848, as amended. Sections 7 and 8 of article 5 of the railroad act, above referred to, are sections 3391 and 3392, How. Stat., and the act of 1848, as amended, is found in How. Stat. §§ 8313 and 8314.

After the counsel for plaintiff had opened the case to the jury, and before any witnesses were sworn in the case, the court asked counsel for plaintiff, in substance, upon what section of the statute this suit was based; and also whether deceased was a married man, or had any person dependent upon him for support; whether he had any family; who were the relations of the deceased. Counsel replied, in substance, that the suit was based on sections 3391 and 3392, How. Stat.; that the deceased was an unmarried man, about 22 years of age, and had no one dependent upon him; and that whatever damages were

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recovered would go to the administrator, to be distributed under the statute of distribution of this State; and that his father would be the proper distributee. The court then, in like manner, asked:

"What do you, then, claim to be the measure of damages?"

Counsel replied:

"Just what the statute says, viz., whatever the jury may deem just and fair."

The court then called counsel's attention to the case of *Chicago & N. W. Ry. Co. v. Bayfield,* 37 Mich. 205, and stated:

"This case seems to make a limitation upon that statute; and I call your attention to it because the question has been up before, and it seems to me to be a question of what the distributees might reasonably have expected to recover or receive during the life-time of deceased. What I seek to bring out is the question which will undoubtedly arise in this case, as to what the rule will be upon which the jury will assess damages, and its limits. From the statement that they are to render such damages as they shall deem fair and just, I think there should be some limitation to that. If there were no persons who had any reasonable expectation of receiving any benefit during his life, I don't know why it wouldn't go to the whole cause of action."

The counsel for plaintiff, Mr. Patterson, then stated that the case cited was under the general law (referring to sections 8313 and 8314, How. Stat:), and that the present action was under the railroad law, which was broader. The court stated that he brought the subject up at that time so that it need not be a surprise to any one.

The proof showed that the deceased was a young man, unmarried, and about twenty-two years of age at the time of his death. No evidence was given that he left any next of kin surviving him; but it appears in the record that a

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brother of his was sworn as a witness, and the statement was made by counsel, as above shown, in answer to the query of the court,—

"That he had no one dependent upon him, and that whatever damages were recovered would go to the administrator, to be distributed under the statute of distribution of this State; and that his father would be the proper distributee."

For the purposes of this case, therefore, we shall assume that it appeared that he had a father and a brother, but that no one was dependent upon him for support. It was also shown that the bill of the physician who attended him was $1, and his funeral expenses amounted to about $60; but it was not shown that any of his next of kin paid these charges, or were liable to pay them, or that decedent's estate was not ample to meet them. It was also shown that he was a healthy man, of good habits, and earning at the time $50 per month. After the proofs were closed, and the court had intimated his purpose to take the case from the jury on the ground that no damages were shown, the court asked counsel for plaintiff if he cared to make further proofs on that subject, and counsel replied that he did not think it was required under the statute; that it was a matter for the jury.

Sections 3391 and 3392, How. Stat. pp. 869, 870, are as follows:

"SECTION 3391. (§ 7). Whenever the death of a person shall be caused by wrongful act, neglect, or default of any railroad company, or its agents, and the act, neglect, or default is such as would (if death had not ensued) entitle the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

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"SECTION 3392. (§ 8). Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered: *Provided,* nothing herein contained shall affect any suit or proceedings heretofore commenced and now pending in any of the courts of this State."

These sections are found in the general railroad law as revised in 1873. Previous to this revision the statute provided (Comp. Laws 1871, § 2351) that the damages should be assessed with reference—

"To the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person."

It was held in this Court, under the statute as it then existed, that the measure of such pecuniary injury would be the loss by the death of what the family was accustomed to receive, or had reasonable expectations of receiving, in his life-time. *Chicago & N. W. Ry. Co. v. Bayfield,* 37 Mich. 214, 215.

In this case it was not shown that the deceased had ever contributed any of his earnings to any of his next of kin, or that it was expected that he would do so in the future, had he lived. It is therefore argued, in support of the ruling of the circuit judge, that the young man was an unmarried adult, who owed no obligation to any one; that there was absolutely no proof whatever tha there was such a person as a father or mother dependent upon him, or who had lost anything by his death, or any person who was legally entitled to a particle of support from him, or who had ever received one dollar from him; and the court could do nothing less than to take such a blind guess from the jury; that if a person has no

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next of kin no recovery can be had for his death, nor if there rests upon him no moral or legal obligation to contribute to the support of next of kin, if any are left surviving him; that the jury have no right, in "fairness and justice," under this statute, to give men blood-money or punitive damages, but the damages found must be compensatory, and susceptible of proof. In support of this claim the counsel for defendant cite the following Michigan cases: *Hyatt v. Adams*, 16 Mich. 180; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Id. 205; *Staal v. Railroad Co.*, 57 Id. 239, 245 (23 N. W. Rep. 795); *Mynning v. Railroad Co.*, 59 Id. 257 (26 N. W. Rep. 514); *Klanowski v. Railway Co.*, 57 Id. 525 (24 N. W. Rep. 801); *Cooper v. Railway Co.*, 66 Id. 261 (33 N. W. Rep. 306); *Balch v. Railroad Co.*, 67 Id. 394 (34 N. W. Rep. 884); *Rajnowski v. Railroad Co.*, 74 Id. 20 (41 N. W. Rep. 847). Reference is also made to authorities from other states, and to text-books.

The plaintiff's counsel contend, first, that the deceased would have been required under the statutes of this State to maintain his father, had such father been unable to take care of himself, and that there can be no doubt of his moral obligation to do so, independently of any statute. But they further argue that, by the revision of 1873, the Legislature intended to, and did, alter the rule prevailing under "Lord Campbell's Act," so called (9 & 10 Vict. c. 93), of which the statutes of this State (Comp. Laws 1871, § 2351) and of other states were a substantial copy; and, by such revision of 1873, not only took away the limit of $5,000 under the old law, but meant to authorize the jury to give such amount of damages as they might deem fair and just, under the circumstances; and that it should not depend on the moral or legal obligation of the deceased to support or contribute to the support of any one. That, as amended by the amendment

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of 1873, the statute does not give these damages for the exclusive benefit of the widow or next of kin, but provides that—

"The amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate." Laws 1873, p. 127.

That it may with reason be contended that the money received would be assets in the hands of the administrator for the payment of debts, and for distribution under the statute of distribution. Counsel in their supplemental brief review the authorities cited from this Court in defendant's brief, and claim the Bayfield case was brought under the old railroad law, as was also *Staal v. Railroad Co.*, 57 Mich. 239, or else under the general law (sections 8313 and 8314, How. Stat.), or that the Supreme Court assumed such to be the case, and decided them upon that basis; and that the other cases, as far as they touch the question here, were also decided under the principles governing the general statute above cited.

Sections 8313 and 8314 of the general law are as follows:

"SEC. 8313. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"SEC. 8314. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in

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every such action the jury may give such damages as they shall deem fair and just *with reference to the pecuniary injury* resulting from such death to those persons who may be entitled to such damages when recovered."

The italicized words in section 8314 show in what respect it differs from section 3392. The latter section authorizes the jury to give such damages as they shall deem "fair and just," without any express qualification as to "pecuniary injury," while the former declares that the same shall be given with reference to such "pecuniary injury." Sections 8313 and 8314, How. Stat., constitute the act of February 12, 1848, as amended by Act No. 94, Laws of 1873. As originally passed, and until 1873, the act confined the damages to the exclusive benefit of the widow and next of kin. See Comp. Laws 1871, p. 1882, § 6725. The amendment in 1873, which is now section 8314, How. Stat., and which enlarges the right to sue, allowing any person who would be a distributee under our statutes of distribution, and pecuniarily injured by the death, to maintain an action for damages through the personal representatives, was enacted at the same session as the amendment to the general railroad law, which is now section 3392, How. Stat.

The query naturally arises, under the position taken by plaintiff's counsel, and in view of these statutes, did the Legislature intend to make one rule in case of deaths occasioned by the wrongful act, neglect, or default of a railroad company, and another rule in reference to deaths caused by the wrongful act, neglect, or default of persons or corporations other than railroad companies? If the contention of the plaintiff be correct, in case of a death resulting from the neglect or wrongful act of a railroad company, the personal representatives of the deceased can sue and recover from such company whatever damages a jury may deem just and fair, without reference to the

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question whether any person has been shown to have suffered any pecuniary injury by such death, while, in the case of such death being caused by some person or corporation other than a railroad company, the personal representatives can only recover damages in case pecuniary injury is shown to some one, and in reference to such injury. This would certainly be class legislation, and we are not prepared to hold that such was the intention of the Legislature. Taking all the statutes together, and the fact that sections 3392 and 8314 were both amended and enacted, as they now read, at the same session of the Legislature, in 1873, we think it must be considered that the fair and just damages in all cases must have reference to the pecuniary injury resulting from the death which is made the basis of the action. We have always held in these actions—although it may be, as claimed by plaintiff's counsel, that the difference between the two sections 3392 and 8314 has never been specially called to our attention before—that the damages must—

"Be based upon some well-defined facts or known circumstances in the case,—such facts as are susceptible of some proof under the well-settled rules governing the admissibility of testimony." *Mynning v. Railroad Co., infra.*

And that the damages must be given in reference to pecuniary injury; and that any injuries that are not susceptible of being compensated by a money consideration must be excluded as elements to be taken into consideration by the jury in determining the amount of damages in this class of cases. *Mynning v. Railroad Co.*, 59 Mich. 262; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Id. 205; *Cooper v. Railway Co.*, 66 Id. 261; *Balch v. Railroad Co.*, 67 Id. 394; *Rajnowski v. Railway Co.*, 74 Id. 20.

In this case the proofs showed no person pecuniarily injured by the death of plaintiff's intestate. No action

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lies in this case out of the mere relation of father and child. The father was in no way injured by the loss of his son's earnings, or deprived of any reliance for his own support. *Clinton v. Laning*, 61 Mich. 359 (28 N. W. Rep. 125). The circuit judge was correct in taking the case from the jury for the reason assigned by him.

It is not necessary to consider the other points raised in the case as to the negligence of defendant, or the contributory negligence of the deceased, or in relation to the admission or rejection of testimony. The plaintiff's counsel was given full opportunity to show proper damages, if any were susceptible of proof. Failing in this, he could not recover under any circumstances, and all other questions become immaterial.

The point is suggested by plaintiff's counsel for the first time in this Court that the cause of action which the plaintiff's intestate, William H. Van Brunt, had for his personal injuries while living survives to his personal representatives, under section 7397, How. Stat., as amended by Act No. 113, Laws of 1885.[1]

It is sufficient answer to this suggestion that plaintiff expressly in his pleadings, planted his suit upon sections, 3391, 3392, 8313, and 8314, How. Stat., and also expressly stated in the court below that he relied for recovery upon sections 3391 and 3392. He must stand upon his pleadings and assertions in the court below.

The judgment is affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

[1] Act No. 113, Laws of 1885, provides that actions for "negligent injuries to the person" shall survive.

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MARION CASE AND ESTHER CASE v. NORMAN GREEN AND MARVIN SPRINGSTEIN.

[See 53 Mich. 615.]

Ejectment—Vested remainder—Reversion expectant on life-estates—Restraints upon alienation.

William Case leased to his son, Hiram S. Case, and to his son's wife, Rebecca Ann Case, a parcel of land for their lives, and, after their death, their son Adelbert Case was to have a like estate in the land; both estates being created by the same instrument. William Case died leaving a daughter, Jennie B. Rice, and the said Hiram S. Case as his sole heirs. The daughter conveyed her interest in the land to her brother, who went into possession, and conveyed the land to Norman C. Green, who succeeded to such possession. After the death of his father, Adelbert Case conveyed his life-estate under the lease from his grandfather to the plaintiffs, who had secured a quitclaim deed from Rebecca Case, and who, during the life-time of Adelbert Case, brought ejectment to obtain possession of said land from said Norman C. Green and another, who defended on the ground that the lease to Adelbert Case was invalid because the absolute power of alienation was suspended for a longer period than during the continuance of two lives in being at the creation of the estate; and in passing upon said claim the Court hold:

a—The estate of Adelbert Case was an expectant estate, and was created when the grant was delivered to Hiram S. and Rebecca Case, at which time the instrument became operative. How. Stat. § 5557.

b—Adelbert's estate was a future estate, being dependent upon the precedent estate of Hiram S. and Rebecca Case. It was what is termed a "remainder," and might be transfered by that name. How. Stat. § 5527.

c—Adelbert being alive, and having the immediate right to the possession of the land upon the ceasing of the intermediate or precedent estate, it was a vested estate in him at the time of its creation (How. Stat. § 5529); and, being a vested expectant estate in him, it was descendible, devisable, and alienable in the same manner as estates in possession. How. Stat. § 5551.

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d—It follows that William Case, the owner of the fee, Hiram S. and Rebecca Case, the owners of the life-estate in possession, and Adelbert, the owner of the remainder, could by uniting in a deed, or by separate deeds, convey an absolute fee in possession, and, upon the death of William Case, the survivors, with Jennie B. Rice, could have done so, and, after she conveyed to Hiram S., he and Adelbert could have done so. Hence there has been no time but what there were persons in being by whom an absolute fee in possession could be conveyed, and consequently the instrument is not a restraint upon the absolute power of alienation, or prohibited by How. Stat. §§ 5530, 5531.

e—As no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise, there is no reason why the present suit may not be maintained. How. Stat. § 5548.

Error to Clinton. (Smith, J.) Argued November 1, 1889. Decided December 28, 1889.

Ejectment. Defendants bring error. Affirmed. The facts are stated in the opinion.

A. C. Baldwin, for appellant, contended:

1. The lease to Hiram and Rebecca Case was for "two lives in being," who took in severalty (see *Case v. Green*, 53 Mich. 617), and the life-estate intended to be conveyed to Adelbert was void under How. Stat. § 5533, which provides that "all the life-estates subsequent to those of the two persons first entitled shall be void." The object of the statute was that in case of a conveyance of the lands it would require but two persons to execute such conveyance besides the one entitled to the remainder or reversion. By giving a life-estate to Adelbert the title to the land was complicated by reason of a *third* life-estate in Adelbert, and this was clearly in violation of the statute; citing *Coster v. Lorillard*, 14 Wend. 265; *Hawley v. James*, 16 Id. 61; *Jennings v. Jennings*, 7 N. Y. 547; *Amory v. Lord*, 9 Id. 403; *Knox v. Jones*, 47 Id. 390; *Smith v. Edwards*, 88 Id. 92; *Hone v. Van Schaick*, 7 Paige, 221; *Van Vechten v. Van Vechten*, 8 Id. 104; *Brewer v. Brewer*, 11 Hun. 147; *DeBarante v. Gott*, 6 Barb. 503; *Ward v. Ward*, 105 N. Y. 68; *Ford v. Ford*, 70 Wis. 18; *DeWolf v. Lawson*, 61 Id. 469;

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Thatcher v. St. Andrew's Church, 37 Mich. 271; *Wilson v. Odell*, 58 Id. 533; *Palms v. Palms*, 68 Id. 355.

J. L. Topping, for appellants, filed a brief in which he contended for the doctrine above stated.

S. L. Kilbourne, for plaintiffs, contended for the rule laid down in the opinion.

CHAMPLIN, J. In 1858, William Case was the owner in fee of the premises described in the following instrument; and on October 13 of that year he executed, and on October 16 acknowledged, the following conveyance, viz.:

"Description of a farm beginning at that part of the west half of section No. two, in township No. five (5) north, of range No. 2 west, lying south of the Looking-Glass river, and all of said section lying west of a line from a point on the south side of the Looking-Glass river running south through the center of the orchard to the line of said section; said line running north and south.

"This indenture, made this 13th day of October, A. D. 1858, by and between William Case, of Saline, Washtenaw county, of the first part, and Hiram S. Case and Rebecca Ann Case, of the county of Ottawa, State of Michigan, of the second part, witnesseth:

"That the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said parties of the second part, the east half of the above-described farm, with the appurtenances thereunto belonging, to the said Hiram S. Case and Rebecca Ann Case during the time of their life, free from the control or interference of any one; and, after the death or deaths of the said Hiram S. Case and Rebecca Ann Case, I, the said party of the first part, do hereby lease and let the east half of the above-described premises, and every part thereof, and appurtenances thereunto belonging, to Adelbert Case, heir of the said Hiram S. Case, to have on the decease of his father and mother, and on the same conditions which it is leased to them.

"The said Hiram S. Case and Rebecca Ann Case do covenant and agree to and with the said party of the first part that they will keep the said described premises, and every part thereof, in good repair, pay all the taxes that

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may be assessed on said land from time to time out of the income and profits of the said land; and the said party of the first part doth covenant that the said parties of the second part, upon performing covenants aforesaid, shall and may peacefully and quietly have, hold, and enjoy said described premises from the time aforesaid, and the same to his son Adelbert after the decease of himself and wife.

"In witness whereof I have hereunto set my hand and seal this 13th day of October, A. D. 1858.

"In presence of— "WILLIAM CASE. [Seal.]
MARY M. CASE.
"C. H. WALLACE.

"STATE OF MICHIGAN, } ss.
Washtenaw County. }

"On the 16th day of October, A. D. 1858, personally came before me, a justice of the peace in and for said county, William Case, to me well known to be the person who executed the above, and acknowledged that he executed the same, for the uses and purposes therein expressed, as his free act and deed. Given under my hand.

"C. H. WALLACE,
"Justice of the Peace."

William Case died prior to March 7, 1862, leaving him surviving, as sole heirs at law, Hiram S. Case, a son, and Jennie B. Rice, a daughter. On March 7, 1862, Jennie B. Rice executed a deed of said premises, without covenants of warranty, to Hiram S. Case. Hiram S. Case and Rebecca Case, his wife, went into the possession of said premises, and after the death of William Case, and on December 15, 1862, conveyed said premises by warranty deed to Norman C. Green, who immediately went into the possession of the same. Hiram S. Case died April 24, 1882, and Rebecca, his wife, died May 1, 1887. On May 4, 1883, Adelbert E. Case and Sarah J., his wife, granted to Marion Case and Esther Case the remainder, which, by said instrument, was given to him after the death of Hiram and Rebecca Case.[1] These grantees have

[1] Rebecca Case had executed a quitclaim deed to the plaintiffs on May 3, 1883. See 53 Mich. 618.

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brought this action in ejectment to obtain possession of the premises under their conveyance from Adelbert, who is still living.

The record presents but a single question, and that is whether the remainder over to Adelbert E. Case is valid. The defendants insist that the instrument is invalid because, as they claim, the absolute power of alienation is suspended for a longer period than during the continuance of two lives in being at the creation of the estate. How. Stat. § 5531. The estate of Adelbert Case was, under our statutes, an expectant estate, and was created when the grant was delivered to Hiram S. and Rebecca Case. The instrument became operative at that time. Id. § 5557. Adelbert's estate was a future estate, being dependent upon the precedent estate of Hiram S. and Rebecca. It was what is termed a "remainder," and might be transferred by that name. Id. § 5527. Adelbert being alive, and having the immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate, it was a vested estate in him at the time of its creation. Id. § 5529. Being a vested expectant estate in Adelbert, it was descendible, devisable, and alienable in the same manner as estates in possession. Id. § 5551.

It follows that William Case, the owner of the fee or legal title, Hiram S. and Rebecca, the owners of the life-estate in possession, and Adelbert, the owner of the remainder, could by uniting in a deed, or by separate deeds, convey an absolute fee in possession. Upon William's death, the same persons, with Jennie Rice, could have done so. After Jennie conveyed to Hiram S., he and Adelbert could have done so. Hence there has been no time but what there were persons in being by whom an absolute fee in possession could be conveyed, and consequently the instrument is not a restraint upon the

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absolute power of alienation, or prohibited by How. Stat. §§ 5530, 5531. As no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise, there is no reason why the present suit may not be maintained. Id. § 5548.

The jury found that Green had notice of this lease, and the right of entry did not accrue until the death of Rebecca; so that there is no statute of limitation to bar a recovery.

The judgment will be affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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ATTORNEY GENERAL, EX REL. EDWIN F. CONELY, v. THE COMMON COUNCIL OF THE CITY OF DETROIT.

Elections—Registration—Constitutional law.

1. Act No. 468, Local Acts of 1889, relative to the registration of voters, etc., in the city of Detroit, is unreasonable and void, in that it undertakes to disfranchise a large number of voters, through no fault of their own, and to make an unjust and unlawful discrimination between the rights of native-born and naturalized citizens and electors.

2. The following propositions are summarized from the opinion of Mr. Justice MORSE:

a—The expense attendant upon obedience to a valid law cannot be alleged as a sufficient reason for not obeying it.

b—The Constitution authorizes the Legislature to enact laws "to preserve the purity of elections, and to guard against abuses of the elective franchise;" but this does not authorize, by direction or indirection, the disfranchisement, without his

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own fault or negligence, of any elector under the Constitution.

c—The laws to regulate elections, and to preserve their purity, and to guard against abuses to the elective franchise, must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote. *Capen v. Foster*, 12 Pick. 488.

d—There is no good reason why the boards of registration cannot sit within the ten days before election necessary to gain a *voting* residence, and thereby preserve to each elector his constitutional right; and the constitutional term of such residence cannot be increased under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will.

e—A registration law is unreasonable which contains no provision by which an elector who is sick on the days fixed for registration can vote on election day.

f—The object of a registry law, or of any law to preserve the purity of the ballot-box, and to guard against abuses to the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege.

g—In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. The power of the Legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction. *Page v. Allen*, 58 Penn. St. 338; *Dells v. Kennedy*, 49 Wis. 555; *Edmonds v. Banbury*, 28 Iowa, 267; *Monroe v. Collins*, 17 Ohio St. 665, 685; *Daggett v. Hudson*, 43 Id. 561; *State v. Butts*, 31 Kan. 554.

h—Requirements which compel a naturalized elector to produce his certificate, or show by evidence other than his own oath that such a certificate was issued, make an unfair and unnecessary distinction between native-born and naturalized electors.

i—No registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply.

j—No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence.

Mandamus. Submitted October 11, 1889. Denied October 11, 1889, and opinion filed December 28, 1889.

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Relator applied for *mandamus* to compel the common council of the city of Detroit to observe and carry out the provisions of Act No. 468, Local Acts of 1889, relative to the registration of voters, etc., in the city of Detroit. The facts are stated in the opinion.

S. V. R. Trowbridge, Attorney General, and *Edwin F. Conely (William P. Wells,* of counsel), for relator.

John W. McGrath, for respondent.

MORSE, J. At the last session of the Legislature an act was passed, entitled—

"An act to preserve the purity of elections, and guard against abuses of the elective franchise, in the city of Detroit."

This act was approved by the Governor July 1, 1889, upon which day it took effect, and became operative. Local Acts of 1889, p. 994.

The relator, in his petition, sets forth that the common council of the city of Detroit has neglected and failed to comply with the law, and still fails and neglects to do so, although well aware that the necessity of such compliance is reasonable and urgent; and that he believes that said common council intend to ignore the act entirely, and that such body intend to hold the city election to take place in November, 1889, under the registration and election laws in force before the passage of this act, the same in every respect as if no such act had been passed. The Attorney General therefore asks that this Court issue a peremptory *mandamus* to compel said common council to resubdivide into election precincts or districts, containing each not more than 300 electors resident therein, such wards of the city of Detroit as may require it, under this act, and to provide suitable and proper means for the registration of electors, upon such subdivision or re-

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arrangement, as the circumstances may require. The relator, from the records in the city clerk's office, makes a showing of the number of votes cast in each election district now existing in said city, 61 in number, at the November election in 1888. This showing, under the act, would necessitate the creation of 68 additional precincts, making a total of 129.

Section 1 of the act provides:

"That, as soon as possible after this act shall take effect, the common council of the city of Detroit shall by ordinance, if it shall appear that at the election held in November, 1888, or at the election held in April, 1889, more than 500 votes were cast in any election precinct, again divide the ward or wards in which such precinct or precincts may be, and establish new election precincts or districts therein, if necessary, or re-arrange the same so that each precinct shall contain, as near as may be, an equal number of electors, no precinct to contain more than 300 electors resident therein; and as often as it shall appear, after any election thereafter held, that more than 600 votes have been cast in any election precinct, said precinct shall, within six months after said election, again be subdivided, or the precincts of the entire ward be re-arranged and divided, so that each precinct shall contain 300 electors, as near as may be, resident therein."

Section 2 provides that for the registration, as provided by the act, to be held in 1889, the inspectors of election selected at the last election shall act, and hereafter four persons for each election precinct, respectively, residents and electors therein, shall be selected in the manner now by law provided for the selection of such inspectors in said city, to act as a board of registration for such precinct, and such board shall elect one of its number as chairman. Said section also constitutes these boards of registration election inspectors, and, in case of the unavoidable absence at any time of any member of the board, the remaining members may temporarily appoint another person to act in his stead until he appears.

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The remaining 23 sections of the act relate to the manner and effect of the registration of voters, some of which sections will be noticed hereafter.

The common council of the city of Detroit, in answer to the order to show cause why the writ of *mandamus* should not issue to compel them to obey this law, says:

1. That a compliance with the law would create in all 129 voting districts; that the expense of such compliance for the approaching municipal election would be over $23,000, and probably $25,000; that the amount to be raised for this purpose upon the assessment and levy for taxes this year is but $6,000; the act was passed after such assessment and levy, and makes no provision for the expense attending and necessary to its execution; that there is no money in the contingent fund of the city, and such expense can lawfully be paid from no other fund.

2. That there are at least 35,000 voters in the city of Detroit, of whom there are at least 5,000 foreign-born electors, who have taken out their naturalization papers, or declared their intention to become citizens, without the State of Michigan; that large numbers of persons so naturalized in other states have voted, from year to year, from five to forty years, within the city of Detroit, and their citizenship has been open and notorious, and their qualifications as electors conceded; that many of them have not now their citizenship papers, but the same have been lost or destroyed; that in many instances it would be impossible to procure certified copies of the same, or any record evidence of their issue; but said electors are able to procure abundant evidence of their exercise of the rights of citizenship, and of electors; that under laws heretofore existing these men have been able to produce sufficient evidence of their rights as electors, but that the act under consideration here practically disfranchises these, at least 1,500, people, who are in fact and in law qualfied voters in said city.

3. That this law will also disfranchise a large number of electors, residents of Detroit, who do business outside of and away from said city, as such persons will necessarily be absent from the city during the days fixed by this act for registration.

4. That it will also disfranchise those persons who from

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sickness are unable to appear before the boards of registration on such days.

5. That it will disfranchise those moving from one ward to another after the last day of registration, who are electors under the Constitution and general laws of the State as to qualifications of voters.

6. That there are at present five duly-elected election inspectors in each of the present 61 election precincts.

That for these reasons, and for other good and substantial reasons appearing upon the face of the law, the act is inoperative, burdensome, unreasonable, unconstitutional, and void.

Upon hearing and argument of this matter upon petition and answer, we, on October 11, 1889, denied the application for the writ. The reasons for so doing will now be stated.

The first objection, as to expense, we did not consider, as it could not be alleged as a sufficient reason for not obeying a valid law.

But a serious difficulty arises in the outset, as to the operation of this law. If we were concerned only with the question of dividing the wards of the city into election districts containing not more than 300 electors,—certainly a desirable thing,—there could be no hesitation in granting the writ; but the object of this law is not simply to create voting districts where the electors shall not exceed this number, but it is a scheme for a new system of registration, and requiring that all persons not complying with the rules and regulations of such registration shall not be permitted to vote, under any circumstances whatever, under heavy penalties. The machinery for the approaching municipal election is not provided by the law, except as it undertakes to provide the same from the law now in force, and which it undertakes to repeal. By this neglect to provide for this emergency, we think the act is inoperative. There are now 61 election districts, with 5 inspectors in each, making in all

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305 inspectors. Under this act there must be 129 districts. Under section 1 of the act, by the statement of votes cast in November, 1888, found in relator's petition, there are but 3 wards—the Fourteenth, Fifteenth, and Sixteenth—that will be undisturbed. In the other 13 wards there are precincts in each that cast over 500 votes. These wards must be re-arranged and subdivided, and 120 districts created, in all, therein. There are 3 precincts each in the remaining wards. An inspector cannot act out of his own precinct; and consequently 45 of those now in office will remain in these 3 wards, as before. But, of the remaining 260 inspectors who are to act in the 120 districts to be created, none of them can act out of the wards or precincts in which they live. As far as their duties as inspectors of election are concerned, there would be no trouble, as the people at the opening of the polls would have an undoubted right to fill all vacancies by election on the spot, or to create an entire new board, if there were no inspectors left in such precinct by the new division and arrangement of the ward.

But it is different with such inspectors acting as a board of registration before election day. The authority to fill vacancies, or to create an entire new board of registration, must be found in the laws. There is no inherent right in the people to do it. This law makes no provision for filling any vacancies in the inspectors acting under the present law. There are but 260 inspectors for 120 districts,—a fraction over 2 for each. It must necessarily happen that in the new subdivision of these wards some precincts will have more than their proportion residing within their limits, and some less, and some will have none. If any precinct should, in such division, be left without any inspectors residing within it, the inevitable result, under this act, would be the disfran-

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chisement of the electors of such precinct for want of registration. *People v. Kopplekom*, 16 Mich. 341. There is no provision in this act providing for any such event, and, having repealed all other registration laws in the city of Detroit, there are no existing statutes to aid or remedy the difficulty.

But, in my view, the law is unreasonable and void in that it undertakes to disfranchise a large number of voters, through no fault of their own, and to make an unjust and unlawful distinction between the rights of native-born and naturalized citizens and electors. The Constitution authorizes the Legislature to enact laws "to preserve the purity of elections, and guard against abuses of the elective franchise;" but this does not authorize, by direction or indirection, the disfranchisement, without his own fault or negligence, of any elector under the Constitution. Article 7, § 6.

The Constitution provides that—

"In all elections, every male citizen, every male inhabitant residing in the State on the 24th day of June, 1835, every male inhabitant residing in the State on the first day of January, 1850, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in the State two years and six months, and declared his intention as aforesaid, and every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this State three months, and in the township or ward in which he offers to vote ten days next preceding such election."

There is also a provision as to electors in the army or navy, not necessary to be here recited. Article 7, § 1.

By this section of the Constitution it will be noticed that there are five distinct classes of persons who are

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made electors, and the only qualification to any of these classes is that the elector shall be of age, and have resided in the State three months, and in the township or ward where he offers to vote ten days, next preceding the election. It cannot be for a moment contended that by section 6 of article 7 the framers of the Constitution intended to give the Legislature the power to arbitrarily disfranchise any elector who is such under section 1 of the same article, or to make any difference between the rights of any of the classes of electors therein specified, or to put obstacles in the way to the ballot-box for one class, while the road is left open to another. The laws to regulate elections, and to preserve their purity, and to guard against abuses to the elective franchise, must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote. *Capen v. Foster*, 12 Pick. 488.

Let us examine the act before use. See Local Laws of 1889, p. 994. The plan of registration under this law is extensive and minute in its details. In this discussion we shall only concern ourselves with its general features and results. It provides that in the year 1889, and again in 1892, and every fourth year thereafter,—striking, by design or accident, a presidential election year,—there shall be a new and complete general registration of voters in the city of Detroit. And it is made the duty of every elector to see that his name is registered in compliance with the requirements of the law, and he shall not be deemed to have acquired a legal residence in the precinct unless he has so caused himself to be registered, "nor shall any ballot be received by the inspectors at any election, *under any pretense whatever*, unless the name of the person offering such ballot shall have been

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entered in the register of the precinct in which he claims to vote as herein provided." Sections 3 and 4.

The elector must personally apply to the board for registration, and such board "shall examine each applicant." Persons who will be of age on election days, having the other qualification of electors, may be entered on the register. "Every applicant, in the years when a general new registration is required, who has commenced to reside in such precinct, and who has resided therein at least two days," if he be otherwise qualified, shall be entered on the register, and can vote on election day, if he has resided therein ten full days next preceding. Section 7.

The meeting of these boards of registration for 1889, and for 1892, and every four years thereafter, is first to be held on the first Monday of October, at which time the board sits for four days, and also again one day, on the fourth Monday of October. The law makes no provision for any other registration in the years of this new or general registration. In this year, the fourth Monday of October came on the 28th, and the city election on the 5th of November, there being seven days between the last day of registration and election day, but whenever the month of October begins on Sunday, Monday, or Saturday more than 10 days will ensue between the last day of registration and the day of election, and, as the act requires that the elector must have actually resided in the precinct two days before his name can be entered on the registry book, this act, in the years of general registration, will disfranchise every voter who has not resided 16 or more days in the precinct before election day, whenever the month of October begins on either one of these three days. For instance, in 1888, October began on Monday. The fourth Monday was the 22d. The general election day was November 6, leaving 14 full days

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between the last day of registration and election; and, adding the two days, every elector not residing within the precinct for 16 full days before the day of election, under this act, would have been deprived of his vote. This would be in direct conflict with the Constitution, which makes him an elector upon a residence of 10 days. No such regulation as this is reasonable. There is no good reason why the boards of registration cannot sit within the 10 days before election, and thereby preserve to each elector his constitutional right. Nor is this all. If the Legislature can make the residence 12 or 16 days, it can make it a month, three months, or one year. This, in my opinion, cannot be done indirectly, under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will. And as one will contend that the Legislature could prescribe by statute that a resident of the city of Detroit must reside in a precinct 12 days, 16 days, or a month, before his ballot could be legally taken on election day, in the face of the Constitution, which provides that he need reside therein but 10 days.

But more unreasonable yet is this act in that it contains no provision by which a person who is sick or absent on the days of registration can vote on election day. It may be said, with some show of reason, perhaps, that a person who is absent on the registration days is himself in fault, in not returning to his home, and complying with the regulations which the Legislature have a right to prescribe; but the man who is ill, and unable to attend the meetings of the board, but who is able to be out on the day of election, is deprived of his ballot, and for no good reason, that I can see. And neither do I think there is any necessity of disfranchising a large number of business men, who will be disfranchised, unless they drop important business, and travel many miles to

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be registered, some seven or more days before election. There are, under this law, but five days in the whole year that an elector can cause his name to be placed on the registry list; and this, unmistakably, by the provisions of the act, he must do personally. The language of the supreme court of Ohio, in speaking of a similar statute of that state, which was by that court unanimously declared unconstitutional, seems very appropriate here:

"It will be seen by the above there are but *seven* [five] days in the year when voters can register. * * * There is no provision for registering at pleasure during the earlier part of the year, and no provision for proving qualifications on election day, and voting. And * * * it is declared that 'no vote shall be received at any election aforesaid unless the name of the person offering to vote be on the registry,' etc. A voter who is the oldest inhabitant of the ward, and an elector in it for the greater part of his life-time, if from absence, however necessary or unintentional, during the seven days, cannot vote if his name is not on the registry. Many absentees may get home to vote, and, if they were afforded opportunities during the year, might also regisister, whose right of suffrage must necessarily be lost under the act. How many mechanics may be absent, pursuing their trades, during the seven days? A large number of persons will be away on steam-boat and other sailing craft, and elsewhere, earning a support. A large number of students, a great many of the class usually termed 'commercial travelers,' will be away, perhaps planning their trips to be home on election day. A large number of citizens in government employ, at Washington and elsewhere, will be at their posts of duty, and may return to vote, but would hardly have the opportunity to return on a different day to register. Even the members of this Court might be unable to register, without a decided detriment to the public business, and might be compelled to elect between the neglect of important official duties and the loss of suffrage." *Daggett v. Hudson*, 43 Ohio St. 561 (3 N. E. Rep. 543).

There is no state in the Union that has ever sustained

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a law like this, except Illinois. All of the registration laws that have been upheld by the courts of other states have contained some provision by which a sick or absent voter might not necessarily be disfranchised, excepting the law of 1885 in Illinois. See *People v. Hoffman*, 116 Ill. 587 (5 N. E. Rep. 596 and 8 Id. 788).

In Massachusetts the board must be in session one hour on the day of election. *Capen v. Foster*, 12 Pick. 485.

In Iowa an elector unregistered, but otherwise qualified, is permitted to vote upon showing a proper reason for not having registered in time, and furnishing the affidavit of a registered voter as to his proper residence. *Edmonds v. Banbury*, 28 Iowa 267.

The election law of Kansas provides that the registry shall close 10 days before election, but permits the voter to register at all times during the year, except on these last 10 days. *State v. Butts*, 31 Kan. 537 (2 Pac. Rep. 618). See, also, Rev. St. Me. 95; Revision N. J. p. 364, § 152; Sup. Code, Md. 240 et seq.; Code Ala. p. 230, § 233; Dig. Laws Ark, 1874, p. 471, § 2328.

In Mississippi registration is required, and the registration lists are to be kept by the clerk of the circuit court, and any person not on the lists may appear at any time before the clerk and be registered.

In Kentucky a clause in a registration law applying only to the city of Louisville, which provided that the elector must reside in the city one year preceding the election, was held void because the constitution required but 60 days' residence in a precinct, and one year in Jefferson county. The balance of the law was sustained, but registration was permitted by the act within the last 3 days preceding the election. *Com. v. McClelland*, 83 Ky. 686.

The registry act of Missouri requires the registration of

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voters to be completed 10 days before the election, but this is also a constitutional requirement.

In California the elector may have his name entered on the list at any time before the poll of the election is opened; but, if he does not do this 30 days before election, he must show a good reason why he did not procure the enrollment of his name previous to said 30 days. *People v. Laine*, 33 Cal. 55; *Webster v. Byrnes*, 34 Id. 273.

In New York, as to cities, under the law of 1865, the board of registration met on Monday before election, which is the day before; and under the amendment of 1872 the registry is completed on the Saturday night before election. The question of its constitutionality has not been raised.

In *Byler v. Asher*, 47 Ill. 101, it was held that the registry law of Illinois was valid; but under that act the non-registered voter was allowed to vote on making proof, in the manner prescribed in the statute, of his right to vote, without showing any excuse for not registering. In *People v. Hoffman*, 116 Ill. 587, a law was sustained which provided for the close of registration on the third Tuesday before election; but, under the constitution of that state, a man must reside in the voting precinct 30 days before election. Nothing is said in the opinion as to persons absent or sick upon the days of registration, but the law makes no provision for an after registry by such electors.

In Wisconsin a registry law providing that no vote should be received at any general election unless the name of the person offering to vote be on the registry as completed by the board, except in the case of a person becoming a qualified voter of the election district after the last day for the completion of the registry, who might vote on making certain specified proof of that fact,

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was held unconstitutional because it gave no opportunity for sick and absent persons to register and vote after the completion of the registry lists. *Dells v. Kennedy*, 49 Wis. 555 (6 N. W. Rep. 246, 381). Under this act, as shown by Taylor, J., in a dissenting opinion at page 569, 49 Wis., and page 385, 6 N. W. Rep., the sick or absent person, being advised of the days of registration, could send his application by writing. But in the act before us this cannot be done.

The registry law of Pennsylvania permits an unregistered voter to prove his qualifications and vote on election day. *In re McDonough*, 105 Penn. St. 490.

In Connecticut (see *Hyde v. Brush*, 34 Conn. 454), it appears from the opinion filed in that case that the registry lists must be closed on Wednesday of the week preceding the election, which would be from four to five days; but it is not stated what the opportunities are for registering before that time.

In our own State the provision as to sick and absent voters is well known; and so far no great abuse of the elective franchise has been developed from the exercise of the privilege therein granted, of registering on election day. How. Stat. § 93

The object of a registry law, or of any law to preserve the purity of the ballot-box, and to guard against abuses of the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the Legislature, in attempting, ostensibly, to prevent fraud, disfranchise

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legal voters without their own fault or negligence. The power of the Legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction. *Page v. Allen*, 58 Penn. St. 338; *Dells v. Kennedy*, 49 Wis. 555; *Edmonds v. Banbury*, 28 Iowa, 267; *Monroe v. Collins*, 17 Ohio St. 665, 685; *Daggett v. Hudson*, 43 Id. 561; *State v. Baker*, 38 Wis. 71; *State v. Butts*, 31 Kan. 554.

These authorities all tend in one direction. They hold that the legislature has the right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or abridge the right, or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to return home to register as well as to vote, making two trips when only one ought to be required.

This act is also not impartial. It seems to be aimed especially at naturalized voters, and, taken all in all, was fitly characterized by one of the counsel as "an act to disfranchise a large number of the legal voters of the city of Detroit." In providing particularly and minutely for the forms of entry in the books of registration (see sections 5–8), subdivision *h* of section 8 provides that:

"*h*. In the column headed 'Court,' the designation of the court in which, if naturalized, such naturalization was had, or, if a declaration of intention was made, the name of the court from which the certificate was issued, and, if the applicant claims the right to be registered and vote as a naturalized citizen, or because he has declared

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his intention six months or more prior to the election, he must produce the proper certificate of such naturalization, or declaration of intention, or satisfactory evidence, other than by the oath of the applicant, must be produced, that the same was issued."

By another subdivision of the same section there must be set down in this book the "date of papers," the time of such naturalization or the making of the declaration, "as appears by the certificates, or other duly authenticated evidence thereof." Subdivision *g*.

The essence of these requirements is that the naturalized voter must produce his certificate, or show, by evidence other than his own oath, that such a certificate was issued. And it would seem that, if he cannot procure from the records of the court evidence that such a certificate was issued, or declaration of intention made, he must produce some person, besides himself, who was present when the declaration was made or certificate issued. Perhaps, under a liberal construction of the law, one who could swear that he had seen the certificate would be a sufficient witness; but, how is he to testify to the date, and the particular court that issued it, or that it was genuine? Why should a person claiming to be an elector by naturalization be debarred, if he has lost his certificate, from establishing such fact by his own oath? A person may swear that he is native born, and he is not required, also, to prove this fact by some one else, before he can be registered; but, if he wishes to show that he is an elector by naturalization, he is presumed to be unable himself to tell the truth under oath, and must be corroborated by some one. The easiest way for a person of this class, wishing to cast a fraudulent vote, would simply be to swear that he was born in the United States; and in such case a perjurer is put to less trouble to get on the registry list than an honest man who

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desires to show that he has been naturalized, but who, unfortunately, has lost the record evidence of such naturalization. This distinction between native-born and naturalized electors is an unfair one, and, as above shown, entirely unnecessary in order to prevent fraud. Its tendency will be to disfranchise honest men, and induce dishonest men to perjure themselves.

Section 13, in reference to removals from one precinct to another, and the necessary steps to become registered in such cases, seems to me most unreasonable and unnecessary; but perhaps this is within the power of the Legislature, as it is not absolutely impossible to comply with it.

But, in relation to naturalized voters, the very men who have probably lost their certificates, and cannot now replace them, are elderly men, who have been naturalized for many years, and have exercised the elective franchise in Detroit, without question, for upward of a quarter of a century. They have, many of them, no doubt, forgotten the particular name of the court in which they took out their papers; and to prove their issue by some one other than themselves would be, in some instances, impossible. A law that treats these men as men whose oaths cannot be taken in their own interest, while it permits a native-born citizen to prove his standing as a voter by his own testimony, cannot receive my sanction, as I believe such a requirement to be not only unjust, but unconstitutional, unless applied to all. Another distinction may also be noted. A native-born citizen, becoming of age between the last day of registration and the election, is permitted to vote; but a foreign-born citizen, who has taken out his first papers, and whose right to full citizenship or the elective franchise will ripen between the completing of the registry list and the opening of the polls, cannot vote.

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In this minute and detailed plan of registration, with its provisions for an elaborate registry book, only two classes of voters are recognized, to wit, native-born and naturalized. Three classes of electors, under the Constitution, are provided for, unless Indians are to be classed with the native-born citizens without any particular designation of their own, and the male inhabitant residing here in 1850, who had declared his intention six months before an election, is to be classed with naturalized voters, and treated the same as the rest. But it is quite possible that there are persons now living in the city of Detroit who were "white male inhabitants" of this State in 1835. A man 21 years old then would be 75 now. This class were not required to be native-born, nor naturalized. They were made voters because they resided here at that date. There seems to be no place for such as these in this registry law, unless they are native-born, or can establish their naturalization. And it is by no means certain that the term "inhabitant" would not include all those who had a residence or fixed settlement and home in Michigan in 1835, although not then of age, if they have since lived in Michigan. If so, a larger number of voters would be affected by this act, as, strictly following the law, they are disfranchised by it.

In my opinion, no registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. If the Legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct opposition to any of the constitutional requirements, then it can as

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well require of the elector entirely new qualifications, independent of the Constitution, before the right of suffrage can be exercised. If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our State, without other qualifications and restrictions upon both native-born and naturalized citizens than those now found in or authorized by the Constitution, then the remedy is with the people to alter such Constitution by the lawful methods pointed out and permitted by that instrument.

This disposition to hamper and abridge the rights of the people to govern themselves, upon the theory that certain communities are unfit to control their own local affairs, which seems to be growing more prevalent in our legislative bodies in this country, must, nevertheless, if the idea be a correct one, be exercised in reason, and within constitutional limits.

This law being, in the respects pointed out, both unreasonable and in conflict with the Constitution, and it being apparent that the Legislature would not have enacted the other portions of the act had it foreseen that the courts would declare these parts unconstitutional, the whole act must fall, and be held unconstitutional and void. *Dells v. Kennedy*, 49 Wis. 560, and cases cited; *Daggett v. Hudson*, 43 Ohio St. 561; *Brooks v. Hydorn*, 76 Mich. 273 (42 N. W. Rep. 1122).

The other Justices concurred.

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GEORGE W. FRITZ v. THE HOME INSURANCE COMPANY.

Fire insurance—Occupancy of premises.

1. The intent of the parties to an insurance policy in respect to occupancy is to be gathered from the usual and ordinary use of the premises for the purposes to which they are devoted. Wood, Ins. 181; *Whitney v. Ins. Co.*, 9 Hun, 87.
2. Where at the time of insuring a farm barn it was occupied by a tenant, who lived on another farm, and used the barn for the storage of produce until sold, of which facts the agent of the company had notice,—the application being a verbal one, and the policy being silent as to occupancy,—the cessation of *such* occupancy by the tenant, after which an agent of the owner of the barn went to the premises frequently to see that the doors were fastened, etc., will not avoid the policy upon the ground that when the policy was issued the premises were occupied in the usual manner by a tenant, and that they became vacant and unoccupied within the meaning of the policy on the cessation of such occupancy.

Error to Allegan. (Arnold, J.) Argued November 1, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Pope & Hart, for appellant.

Joseph Thew (Padgham & Humphrey, of counsel), for plaintiff.

LONG, J. This action was brought to recover for the loss of a barn by fire. The policy was issued on July 2, 1887, by H. F. Marsh, the local agent of the defendant company. The application was verbal. The principal defense relied upon was that the barn and premises insured were at the time of the fire, and for some three months prior thereto had been, vacant and unoccupied,

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without the consent of the company, and contrary to the provisions of the policy.

The evidence tended to show that some time before the policy issued the farm upon which the barn was situate was let by the plaintiff to one George Strayer, for three years, and the plaintiff went to the Upper Peninsula to live. He returned some time in June, 1887, and on July 2 called upon Mr. Marsh, the agent of the company, to insure the barn on the farm. The plaintiff advised Marsh that he was living in the Upper Peninsula; that the farm was rented to Strayer, but that Strayer did not live on it, but lived on the farm of Renick, a short distance away. The plaintiff also advised Marsh that he did not want the old house on the farm insured, because it was worthless, and no one could live in it. Marsh was aware at this time that no one lived on the farm,—that there was no house to live in; and he also knew where the tenant, Strayer, lived, and knew the Renick farm, and the location of the building where Strayer lived, which was more than a half mile from the barn in question. The policy was issued for $450, and delivered to the plaintiff, who soon after went north. Before going, he informed his father-in-law, John King, that Strayer's time expired on January 1, 1888, and requested him to look after the place, and take charge of it for him, and rent it, if he found a good man. Strayer simply worked the farm on which the barn stood, and used the barn to put produce in until it was sold. Occasionally he put farming tools in the barn, when he was there at work, and left them there until he was through using them, and then took them back to the Renick farm, which he was working, and where he kept his stock, team, and tools. He never kept stock or teams at the plaintiff's farm, except when in use there, and only used the barn to store products.

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Some time in the fall of 1887, Strayer moved from the Renick farm into the village of Allegan, and left nothing in plaintiff's barn except some oats. He had corn on the farm, which he afterwards husked, and used to go down to the farm occasionally, on Sundays, to look after things generally. About January 1, Strayer took his oats away, and left nothing in the barn, and nothing on the premises except a binder, which stood out doors, and was frozen down so he could not move it. As soon as Strayer had taken his oats away from the barn, King took charge of it; went up to the premises frequently to see to things,—to see that the doors were fastened, etc. This was kept up by him until a day or two previous to the fire.

The fire occurred on March 30, 1888. Plaintiff was not advised of the fire until April 11, following, when he called on Marsh to have the loss adjusted. The company subsequently refused to pay the loss, principally upon the ground that when the policy was issued the premises were occupied, in the usual manner, by a tenant, until January 1, 1888, when the premises became vacant and unoccupied, within the meaning of the policy.

It was contended on the part of the plaintiff that the company had knowledge by its agent, Marsh, at the time the policy issued, as to what the nature of the occupancy was, and was fully informed of the situation of the premises; and that the occupancy was substantially the same when the fire occurred as when the policy was issued. Upon this question the court instructed the jury:

"Now, if you find, under the evidence and instructions of the court, that this barn was insured as upon a farm leased to a tenant who lived off of and away from the farm, and upon another farm, and if you further find that the use and occupation of the premises by the tenant until he quit the place was such as is usual in such cases,—a substantial use and occupation, under such circumstances, such as the policy contemplated,—and if you

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further find that King, as the agent of the plaintiff, and by his authority, soon after the tenant quit, and before the fire, took charge of the premises, and used and occupied the premises substantially as contemplated by the policy, had the tenant continued on as such tenant to and including the time of the burning of the barn, * * * I charge you that the policy is not void by reason of any vacancy or failure to occupy; but if, in such case, the care and vigilance on King's part was less, in any measurable degree, than would be incident to the use of the premises for the purposes intended under the policy, this would render the policy void. The plaintiff may, under such a policy as this, as well use and occupy the premises by himself or by his agent as by a tenant; and, in each case, the use and occupation need be no more, and cannot be measurably less, in either care or vigilance, than is incident to the purposes for which the insured property was intended under the policy."

I see no error in this charge, under the circumstances of the issuing of this policy. The policy itself is silent upon the question as to whether this barn was occupied at the time. The application was a verbal one, and Marsh (the agent) was fully cognizant of the situation and surroundings there. He knew that Strayer did not live on the premises, as well as the uses to which he put the barn, and there is nothing in the case making it apparent that the risk was increased or made more hazardous by being put under the care and supervision of King than it would have been under the care of Strayer; and the court, in another part of the charge, very properly told the jury that if the agent (Marsh) issued the policy knowing these facts, without further question as to the occupancy or the use of the premises, then the only use and occupation which the defendant can insist on, under the policy, is such as is usual and customary of such a farm and barn as this, by a tenant who does not reside upon, but away from, the farm.

It is true that "occupying" means "using;" but the

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occupation of a barn means a very different use than that of a house, or any outbuilding. If the policy had been upon a house occupied by a tenant, then the vacancy would occur by the removal of the tenant, unless some other moved in and continued to occupy; but here the agent understood the use to which the barn was put, and where the tenant resided, and the degree of care and supervision that was then being applied to it, and how its use was to be continued. The dwelling there, he knew, was not fit for habitation, and it was not anticipated or expected that anyone would live there, on the farm, or that any oversight should be given the barn, except such as a tenant on another farm, going there occasionally, might give. It was as much occupied when King took control of it as when Strayer had it, during those portions of the year after he had removed his grain.

The intent of the parties in respect to occupancy is to be gathered from the usual and ordinary use of the premises for the purposes to which they are devoted. Wood, Fire Ins. 181; *Whitney v. Ins. Co.*, 9 Hun, 37.

The court was not in error in permitting proofs of the situation and surroundings at the time the policy issued, or of the arrangement made by plaintiff with Marsh, and what was said by him.

Some question is raised, under the assignments of error, upon the ruling of the court in the admission of testimony, which we do not deem of sufficient importance to discuss.

The trial was a fair one, and the judgment must be affirmed, with costs.

The other Justices concurred.

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WASHINGTON H. BRINGHURST v. THE GRAND RAPIDS & INDIANA RAILROAD COMPANY.

Eiectment—Undivided interest—Judgment.

1. The record in actions of ejectment is much more important under our statute than it was at common law, where ejectment was merely a possessory action. Under the statute it is used to determine *title* as well as possession, and the statutory requirements should be observed.
2. The verdict in ejectment must follow the declaration as to the description of the premises, and the extent and quality of the estate claimed. How. Stat. §§ 7795–7797, 7815, 7821; *Reilly v. Blaser*, 61 Mich. 399.
3. Where a plaintiff establishes his title to only an undivided one-half of the land described in his declaration, and the defendant is in peaceable possession, and is not an intruder, judgment should be rendered accordingly, and the declaration may be amended to correspond with the right established at the trial. *Hinman v. Booth*, 21 Wend. 267.

Error to Emmet. (Ramsdell, J.) Argued November 6, 1889. Decided December 28, 1889.

Ejectment. Defendant brings error. Reversed. The facts are stated in the opinion.

T. J. O'Brien and *J. H. Campbell*, for appellant.

Earle & Hyde, for plaintiff, contended:

1. The question raised by defendant is, can a plaintiff in ejectment recover against a defendant who is in possession without any right or title,—a mere intruder, a trespasser,—when the plaintiff is the owner of but an undivided one-half of the premises? We say that plaintiff is entitled to recover the whole description, although he failed to prove title to but an undivided one-half; citing *Lair v. Hunsicker*, 28 Penn. St. 115; *Johnston v. Jackson*, 70 Id. 164; *Campbell v. Fletcher*, 37 Md. 430; *Perry v. Whipple*, 38 Vt. 278; *Bryan v. Wear*, 4 Mo. 106; *Hunter v. Starin*, 26 Hun, 529; *Bradshaw v. Emory*, 65 Ala. 208.

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2. Even where no legal title is shown by either party, the one showing the prior possession in himself or those through whom he claims will be held to have the better right. Such prior possession is a sufficient title to enable a party to recover against an intruder, and even against one whose claim of title is founded on a later possession; citing *Hunter v. Starin*, 26 Hun, 529; *Whitney v. Wright*, 15 Wend. 171; Tyler, Eject. 72.

3. In ejectment plaintiff can recover the entire premises on an undivided interest; citing *Covert v. Morrison*, 49 Mich. 133; *Hardy v. Johnson*, 1 Wall. 371; *Collier v. Corbett*, 15 Cal. 183; *Treat v. Reilly*, 35 Id. 129; *Yancey v. Greenlee*, 90 N. C. 317; *Weese v. Barker*, 7 Col. 178; *Alford v. Dewin*, 1 Nev. 207.

4. But we say plaintiff proved title to the entire of said premises, and that the court erred in excluding the record of the deed of the other undivided half of the land because only attested by one witness. This fact did not render the deed void; it was as effectual to convey all the interest of the grantor as if attested by two witnesses; citing *Dougherty v. Randall*, 3 Mich. 581, 585; *King v. Carpenter*, 37 Id. 363, 369; *Price v. Haynes*, Id. 487.

5. While, under the decisions in this State prior to the curative act of 1861 (How. Stat. pp. 1488, 1489), the record of such a deed is held not admissible in evidence, such record under How. Stat. § 5727, was legal notice and evidence of the transfer of said undivided one-half interest, and should have been admitted as evidence of that fact; citing *Brown v. McCormick*, 28 Mich. 215, 220.

CHAMPLIN, J. The plaintiff brought ejectment, claiming title in fee to the parcel of land described in his declaration. He did not show actual possession or occupancy, but depended entirely upon paper title, which he showed beyond question to an undivided half of the premises. He failed to prove title to the other undivided half.

The land in dispute is in the possession and occupation of defendant as a track for railroad purposes. Prior to 1881, the Bay View, Little Traverse & Mackinac Railroad Company constructed its road upon and over the land in question, and had actual possession thereof. While so in possession, it executed a mortgage to William R. Shelby.

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This was foreclosed, and the Grand Rapids & Indiana Railroad Company became the purchaser, and succeeded to the possession of the premises in 1882 or 1883, and has ever since operated a railroad over the same. Plaintiff obtained his deed in 1885.

It does not appear that before the entry of the Bay View, Little Traverse & Mackinac Railroad Company the premises were in the actual possession of any one. The defendant, succeeding to that possession under a claim of right, and holding it in peaceable possession for such length of time, cannot be regarded as a mere intruder. Neither can it be said that this suit is brought to determine the right of possession merely. It is brought to determine title, and the plaintiff having failed to establish his title to the whole premises, and succeeded only as to an undivided half, he was not entitled to a verdict and judgment for the whole.[1] In this respect there was error in the charge of the court and the verdict of the jury. The court should have directed a verdict for an undivided share, as provided for by section 7815, subd. 6, How. Stat. Had he done so, the declaration might have been amended to correspond with the right established at the trial. *Hinman v. Booth*, 21 Wend. 267.

We adhere to what was said in *Reilly v. Blaser*, 61 Mich. 399 (28 N. W. Rep. 151). The record in actions of ejectment is much more important under our statute than it was at common law, where it was merely a possessory action, and did not determine the title to the land. Under the statute, it is used to determine title as well as possession, and the statutory requirements should be observed. The verdict must follow the declaration as to the description of the premises, and the extent and

[1] The failure to prove a complete title was due to the rejection of the record of a deed offered in evidence by plaintiff, on which he based an undivided half of his title, with but a single attesting witness.

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quality of the estate claimed. How. Stat. §§ 7795–7797, 7815. The necessity for this is obvious, when the effect of a judgment in ejectment is considered. Id. § 7821.

The judgment must be reversed, and a new trial had.

The other Justices concurred.

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JENNIE PINKERTON v. MARINUS VERBERG.

Arrest—Misdemeanor—Warrant—Street walking.

1. An arrest, without a warrant, of an alleged prostitute or street-walker by a police officer, who is authorized by ordinance to arrest, upon view, any person found in the act of committing any offense against the laws of the State, on mere suspicion that she is plying her vocation upon the street, no act being committed in his presence indicating that she is there for that purpose, is illegal.

2. The following propositions are summarized from the opinion of Mr. Justice LONG:

a—Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all citizens.

b—One may travel along the public highways or in public places; and while conducting himself or herself in a decent and orderly manner, disturbing no one, and interfering with the rights of no other citizen, there, they will be protected under the law, not only in their persons, but in their safe conduct.

c—The Constitution and the laws are framed for the public good, and the protection of all citizens; and no one may be restrained of his liberty, unless he has transgressed some law.

d—Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppres-

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sive and unjust, and destroy all the rights which our Constitution guarantees.

e—Suspicion that a party has on a former occasion committed a misdemeanor is no justification for giving him in charge of a constable without a justice's warrant; and there is no distinction, in this respect, between one kind of misdemeanor and another. 1 Archb. Crim. Pr. & Pl. 102 (note 1).

f—An arrest for misdemeanor, without a warrant, by one who does not see the offense committed, is illegal.

Error to Kalamazoo. (Buck, J.) Argued November 1, 1889. Decided December 28, 1889.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Hampden Kelsey, for appellant.

James H. Kinnane, for defendant.

LONG, J. This action is brought by plaintiff to recover damages for assault and illegal arrest. Defendant, at the time of the arrest, was a policeman of the city of Kalamazoo, and claims to have arrested plaintiff because she was a street-walker.

It appears that plaintiff lived on Kalamazoo avenue east, and sometime in the forepart of August, 1888, went from her own home to a sister's, living on the corner of Church and Eleanor streets, in the city. There she met a younger sister, and the two went down into the city upon the main street; called into the Watkins House closets; and after plaintiff had shown the younger sister, who had no acquaintances in the city, around the city for a time, the two went together back to the home of the sister, when plaintiff started to return to her home, and in doing so she again passed the Watkins House, but on the opposite side of the street. After having gone some little distance from there towards her own home, she heard some one following her on the walk. She

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hastened her speed, but, when near the railroad crossing, Mr. Verberg, the defendant, walked up to her side, and asked where she was going. She told him she was not going very far, and then he wanted to know where she lived. To this plaintiff responded that she did not know as that made any difference to him. Defendant then asked what her name was. She told him that did not make any difference to him, and that she was attending to her own business. Defendant continued to walk with her until she got to her own door, and she then told him that she lived there. Plaintiff then told him he was not much of a gentleman to be following her home, when he said not to give him any more sauce, or he would take her and run her in. Plaintiff then says:

"I told him I had not done anything to be run in for; that I did not know what he could run me in for; I guessed I had not done anything out of the way; and so he took hold of me, and took me up town. When he got up to the corner of Water street, I told him I was not going any further with him, and he got hold of me, and tore my dress pretty nearly all off of me, and tried to make me walk, and blew a whistle, and Mr. Warren, who was across the street, came over, and asked him what he arrested me for, and he said he had made up his mind that he would not take any more of my sauce, and when they got upon the corner they stopped there, and Mr. Warren told him he knew me; that I was a married lady. They went out to one side, and had a talk, and Mr. Warren said: 'You can do as you have a mind to; but I don't think you had better lock her up.' Mr. Warren walked down Main street, and Mr. Verberg said I could go home if I wanted to; but, if he ever caught me out again as late as that, he would take me and lock me up. It was then about half past ten o'clock, and I went home."

Witness further stated that defendant took hold of her arm at and in front of her own house, and pulled her along as far as the railroad, and as far as Water street,

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when he tore her clothes because she would go no further.

Defendant gave his version of the affair, on his direct examination by his own counsel, as follows:

"I saw her on this particular night by the Watkins House with three other women, and they all went into the house. I slipped into the office of the Watkins House. They stayed in there a few minutes, and came out, and went up as far as Rose street. They crossed over, and she came down the street alone. She went east on Kalamazoo avenue. I walked down that way to see what was going to be done. I believed she was plying her vocation as a prostitute. She walked quite fast. I walked down to the Grand Rapids & Indiana R. R., caught up to her, and asked where she lived, and what her name was. She said it was none of my business. I said: 'I have asked you a civil question, and I would like to have you answer it.' She said: 'I don't have to answer any questions from you.' I said: 'Well, I have had orders to that effect, to make these street-walkers get off the street or lock them up.' By this time she had got in front of her own house. I didn't know at that time that she lived there. She said: 'I dare you to arrest me.' She said I had no business down there; I had no business to follow her; she was attending to her own business, and I had to attend to mine. She dared me to lock her up; to arrest her. At first I started away. She hallooed after me: 'Will dare you to arrest me.' I came back and said: 'Come on; if you want to go to jail, I can take you there.' So we walked up as far as Dickinson's hardware store, and she stopped, and I says: 'Come on; don't stop here.' She walked along then, and right in front of the restaurant, between the alley and back of McDonald's drug-store, she threw herself right down on the sidewalk, and I asked her to get up two or three times. She refused to do it. I thought by the way she acted and talked she had been drinking. I didn't see any one around close by. I didn't want to have no regular wrestle there, so I blew my whistle, and Mr. Warren came up, and assisted me in getting her up. When we got her up by the corner of Main and Rose streets, she said, if we would not lock her up, she would go home, and she awfully hated to be locked up,—begged in that way. I

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spoke to Mr. Warren a few minutes, and finally told her, if she would go home, I would let her go to-night, and, if I caught her out again, I would lock her up, as late as that."

Witness further testified that he did not know that he tore any of her clothing.

It will be noticed that there is but little difference in the versions given by the parties to the controversy as to what took place on that occasion. The court, in his charge to the jury, stated:

"The defendant claims that he had a right to arrest the plaintiff because he was at the time of making the arrest a policeman of the city of Kalamazoo, and that at the time of the arrest the plaintiff was engaged in the commission of an offense against the law.

"The charter and ordinances of the city of Kalamazoo provide that policemen shall have authority to arrest, without warrant, all persons who shall, in their presence, be guilty of any offense, misdemeanor, or breach of the peace, or who shall, in their presence, be guilty of any disorderly conduct, for punishment of which a warrant could lawfully issue. Disorderly conduct for which an arrest might be made without a warrant, if committed in the presence of the officer, would include what is commonly termed 'street walking.' That is the offense of a common prostitute offering herself for sale upon the streets at unusual or unreasonable hours, endeavoring to induce men to follow her for the purpose of prostitution; and, in case such an offense is committed in the presence of an officer, a policeman has not only the authority, but it is also made his duty, to arrest the person so offending. So, in order to determine whether the defendant had the right to make the arrest complained of in this case, it will be necessary for you to inquire and determine whether the plaintiff was at the time of the arrest engaged in the commission of any offense, or whether the defendant had any reasonable ground for believing she was.

"If you should find that at the time she was arrested by defendant she was conducting herself in an orderly manner, not committing any breach of the peace, or disorderly conduct, or offense against the law, and that the

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defendant had no reason to believe she was, then the defendant had no right or authority to arrest her, and the plaintiff would be entitled to a verdict; and in such a case it makes no difference what her past history may have been, nor what her character was, so far as any justification of the defendant was concerned. But if you find, from the evidence in the case, that at the time of the arrest the plaintiff was a woman of unchaste character, and was upon the street engaged in street walking,—that is, if she was upon the street for the purpose of attracting attention, and inducing men to follow her for purposes of prostitution,—then the plaintiff is not entitled to recover, and your verdict should be for the defendant, unless you find that defendant used unnecessary force and violence in making the arrest.

"Or if you find, from the evidence in the case, that the plaintiff was at the time of her arrest by the defendant an unchaste woman, and known by the defendant to be so, and if you also find that she had at that time the reputation of being a common prostitute, whether that reputation was deserved or undeserved, and that this reputation was known to defendant, and if you further find that she was at that time upon the public streets, at such an hour and under such circumstances,—if her conduct was such,—that the defendant had reason to believe that she was engaged in street walking,—then, whether she was so engaged in street walking or not, the defendant would be justified in making the arrest, and, unless you find he used unnecessary force and violence in making the arrest, your verdict should be for the defendant. The question, as I have already indicated to you, is not altogether whether the plaintiff was already engaged in street walking, but whether the defendant had reasonable ground to believe she was, and made the arrest upon such ground. If he had reasonable ground to believe that she was engaged in street walking, and made the arrest on such ground, then defendant would not be liable, although, as a matter of fact, the plaintiff was in the streets for a legal purpose."

In order to better understand the force and effect of this charge, it will be necessary to consider the evidence to some extent that the court permitted the defendant to introduce. While the plaintiff was on the stand as a

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witness in her direct case, the counsel for the defendant was permitted, under objection of plaintiff's counsel, to ask her:

"Your husband had you arrested the other day for assault and battery?"

It appears that this arrest was made after the time of the assault claimed to have been made in the present case, and the witness testified that she had never been arrested in her life, until the time when the defendant arrested her. In answer to the question propounded, she stated that her husband did cause her arrest for assault and battery. Witness was further asked if, upon one occasion, Officers Warren and Verberg did not call upon her one night, and find her in bed with one Charles Vose. Plaintiff denied this, and claimed that she had a room there, and worked for Charles Vose, and his father and mother, in their restaurant. It appears that, several years before this arrest, plaintiff's husband had been arrested, and convicted, and sent to State prison for some offense, but had recently returned. The plaintiff and he were then living together.

The defendant, while on the stand as a witness, was permitted to testify that about a year previous he and another policeman visited the Gale Block, in which was the Vose restaurant, and there knocked on the door; that Mr. Vose came to the door, and, being asked who was in there with him, answered that it was his wife; that he had also seen the plaintiff a great many times on the street at from 10 to 12 o'clock, and that she did not seem to be doing any business, but just walking the street.

Plaintiff was recalled by the defense, and testified that she was never put out of the Gale Block in consequence of living with Mr. Vose; that he did not live there with her; that he had a room there, and she had a room, and a good many others had rooms there; that Mr. Miller,

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the janitor of the building, never told her to move out in consequence of the manner in which she conducted herself. Mr. Miller was then called by the defendant, and testified that plaintiff had rooms there; that he served papers to get Vose out, but was not acquainted with the reputation of the plaintiff at that time; that he saw a man in there one night, but could not see if there was anything wrong; that it might have been Mr. Vose, as he told him they were going to be married in about a week. Witness testified that he saw men go into the big hall door, but could not say whether the room where they went was occupied by her.

Mr. Warren was also called, and testified to seeing plaintiff in bed with Vose. Other testimony of like character was also given by defendant, under objection of counsel for the plaintiff. Defendant also gave evidence of the general reputation of the plaintiff as a common prostitute. Plaintiff denied all the specific acts of lewdness to prove which such witnessess were called.

At the close of the testimony the counsel for plaintiff asked the court to instruct the jury:

"1. If the jury shall find that the plaintiff, at the time she was arrested by the defendant, was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her.

"2. No officer is justified in making an arrest without a warrant, when the person whom he arrests is peaceable, and not engaged in open violence; as, for example, by fighting, engaging in a riot, or about to escape after committing a felony.

"3. The law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace; as, for example, in fighting, or in a riot, or about to escape after having committed a felony.

"4. If the jury shall find that the plaintiff was, at

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the time she was arrested, walking on the street, without molesting any one, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act.

"5. If the jury shall find from the evidence that the plaintiff, at the time of her arrest, was walking on the street in a lawful manner, then the jury would be warranted in going beyond actual damages, and giving the plaintiff a further sum as exemplary damages."

These instructions the court refused.

It is insisted here that the arrest was legal, and within the authority of the officer, under the provisions of section 3 of chapter 14 of the charter of the city of Kalamazoo. This section is as follows:

"SEC. 3. The marshal and police shall have and exercise, within said city, all the power given by law to constables for the preservation of the peace and to apprehend and arrest offenders against the laws of the State. They shall have the power to enter any disorderly or gaming house, or dwelling-house, or any other building where a felon is known to be secreted or harbored, or where any person is who has committed any breach of the peace, or where any felony or breach of the peace has been committed.

"It shall be the duty of the said marshal and police, and they are hereby fully authorized, to suppress all riots, disturbances, and breaches of the peace; to arrest, upon view, all persons fleeing from justice; to apprehend, upon view, any person found in the act of committing any offense against the laws of the State; and to take such persons before the proper officer or magistrate, to be dealt with according to law; to make complaints before the proper officer or magistrate of any person known, or believed by them, to be guilty of crime, or having violated any ordinance or regulation of said city; and to serve all process, writs, and warrants that may be delivered to them for that purpose, or that may be required in any prosecution for the violation of any ordinance or regulation of said city.

"In prosecutions under any city ordinance or regulation of said city, the marshal and regular police thereof

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shall have the same powers, and shall perform the same duties, as are given to and performed by constables under the laws of the State; and, generally, they shall perform all such duties pertaining to their respective offices as may be required by the city council."

It is claimed further, by counsel for defendant, that the question whether the plaintiff was at the time of the arrest engaged in street walking or not, or whether the defendant had reasonable grounds to suppose that she was, was a question for the jury, and, as such, was properly submitted to them; that it appears from the record the officer well knew the reputation of the appellant, and that she was a common prostitute; and, judging from her actions, the unseasonable time of the night, and the suspicious quarter of the city, it cannot be said the officer acted arbitrarily, or without good and reasonable grounds for assuming and believing that the appellant was then and there on the public streets plying her vocation as a common prostitute. Counsel states, as a further proposition, that,—

"Assuming it to have been true that the defendant acted upon an uncertainty, but had good and reasonable cause to believe that the plaintiff was conducting herself unlawfully and in a disorderly manner, and did so believe, he would still be justified in making the arrest in the manner that he did."

It is not claimed that the defendant had a warrant for the arrest of the plaintiff at the time he took her into custody, and started to convey her to the jail; and it appears that no warrant had ever been issued for the plaintiff's arrest for that or any other offense. From the whole record, it appears that the only excuse offered by the defendant for the arrest on that night was that he had heard her reputation as a common prostitute discussed by the police officers of the city, and some others; had made up his mind that she was such, and had seen

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her frequently on the streets, sometimes at unseasonable hours, and at one time found her in bed with a Mr. Vose. This is about the substance of the reasons given by him which led him on that night to believe she was on the street plying her vocation as a common prostitute. All he had seen that night was that the plaintiff was down on Main street, went into the Watkins House with three other women, and from there up the street for a distance, and, turning, walked towards her own home. He does not testify nor claim that he saw her talking with any man, or that she accosted any man, or did anything more than walk along a public street towards her own home, as any decent or well-behaved lady might have done. She was even hurrying forward faster when she heard the defendant's footsteps rapidly approaching her as if to overtake her. When he had overtaken her, he asked her name and where she lived, and kept pace with her until she arrived opposite her own door. He was not successful in finding out her name, and claims the plaintiff told him it was none of his business. He started and walked away from her for a little distance, according to his own testimony, when she told him, or hallooed at him, as he says, and dared him to arrest her, when he turned and said:

"If you want to go to jail, I can take you there."

He then made the arrest. Can anything be more certain, even from the defendant's own testimony, than that the arrest was made because, as plaintiff says, she gave him some sauce, or, as defendant says, she dared him to arrest her? He knew as well when he started to leave her whether she was on the street plying her vocation as a common prostitute as he did when he made the arrest; and yet he turned away to leave, and only made the arrest when she dared him to make it.

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If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer. Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons,' but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. Whatever the charter and ordinances of the city of Kalamazoo may provide, no police officer or other conservator of the peace can constitutionally be clothed with such power as was attempted to be exercised here. No disorderly conduct; no breach of the peace, committed in the presence of the officer; no suspicion of felony,—and yet, under the charge of the court which counsel seeks to maintain here, a woman may, simply upon sus-

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picion that she may commit an act which at most would only amount to a misdemeanor, be assaulted and imprisoned, if the officer has good reason to believe, and does believe, that she is plying her vocation in such a manner that it will result in an offense.

No more dangerous doctrine could be laid down. It is a doctrine which, if upheld, would place even the most respectable lady in the land under the surveillance of policemen, and give them authority to arrest and imprison upon mere suspicion of an offense, however insignificant; and, if carried to the extent contained in the charge of the circuit judge, it would not matter how undeserved the bad character or reputation of such person might be. If idle gossip is once set afloat, reflecting upon the character and reputation of the most virtuous woman, and that gossip once comes to the ears of the police officer, he may act upon it, and be led to believe that the woman is upon the street intending to ply her vocation as a street-walker or common prostitute, and at once, without the formality of complaint or warrant, place her under arrest and convey her to jail. The law has more regard for the liberty of the citizen, and there is a more decent and orderly manner of enforcing the law for the public good. The officer had no right to arrest the plaintiff, without warrant, upon mere suspicion that she was upon the street for the purpose of plying her vocation as a common prostitute, even under the provisions of the city ordinance above cited. Our statute gives no such right, and at the common law no such right existed. Suspicion that a party has on a former occasion committed a misdemeanor is no justification for giving him in charge of a constable without a justice's warrant; and there is no distinction, in this respect, between one kind of misdemeanor and another. 1 Archb. Crim. Pr. & Pl. p. 102, note 1; 2 Hale P. C. 89.

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An arrest for misdemeanor, without a warrant, by one who does not see the offense committed, is illegal. In *People v. Pratt*, 22 Hun, 300, it was held that an officer had no authority to arrest, without warrant, a common prostitute, unless disorderly conduct is committed in his presence. It is true that an officer, as a conservator of the peace, may arrest street-walkers or common prostitutes who are on the street plying their vocation; but a mere suspicion that they are doing so, where there is no act indicating that the party is there for that purpose, will not justify the arrest without warrant. In *Sarah Way's Case*, 41 Mich. 304, Mr. Justice CAMPBELL, speaking upon the subject of arrest without warrant, says:

"It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in those cases where the public security requires it, and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer. *Quinn v. Heisel*, 40 Mich. 576, and *Drennan v. People*, 10 Id. 169."

The court was in error in that portion of his charge relative to the defendant's acting upon his information and belief that the plaintiff was a common prostitute, as a justification for the arrest without warrant. The court was also in error in refusing to give the plaintiff's requests to charge. Each request stated the law correctly as applied to this case, and should have been given. The court was also in error in permitting defendant to introduce evidence of specific acts of lewdness on the part of plaintiff. On such a trial, it could not be expected that a party so attacked could be prepared to meet every issue so made.

The judgment must be set aside, with costs, and a new trial ordered.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred.

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ELIZA ASHTON v. THE DETROIT CITY RAILWAY COMPANY.

Practice in circuit courts—Demurrer—Negligence—Choice between two dangers—Evidence.

1. Where a defendant does not elect to stand upon his demurrer, when overruled, but pleads issuably, and goes to trial on the merits, an assignment of error on the overruling of the demurrer will not be considered.
2. Plaintiff sued defendant for injuries received in alighting from one of its cars while in motion, and was allowed to testify, as showing her reason for so doing, that on a former occasion the car on which she had taken passage left the main line before reaching her destination, and was driven into defendant's barn, where on leaving it she was insulted by a man in said barn; and that on the occasion of the accident the car again started for the barn, when she rang the bell, but the signal was disregarded, and for fear of a repetition of her former experience she left the car and was injured, and said testimony is held to have been competent and relevant.
3. In such a case the question whether the treatment the plaintiff received at defendant's barn was sufficient to justify her belief that she was avoiding an actually impending danger, into which she was being taken, by leaving the car, is a question for the jury, and not for the court.
4. A physician who is called to treat a person for an injury, when sworn as a witness in a suit to recover damages for the same, may state how the patient described the pain from which she was suffering, and may describe the patient's actions, as tending to inform the jury of the patient's condition.

Error to Wayne. (Hosmer, J.) Argued November 1, 1889. Decided December 28, 1889.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Brennan & Donnelly and *Sidney T. Miller*, for appellant, contended:

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1. The doctrine of choice between two dangers (if we may so call it) is not a very old one. It apparently took its rise in 1816, in the case of *Jones v. Boyce*, 1 Stark. 493, for, in his opinion in that case, Lord Ellenborough says that is the first of the kind that he recollects. There must be such danger that it would be obvious to the average reasonable man, if he were placed in the position; citing *Stokes v. Saltonstall*, 13 Pet. 181; *Ingalls v. Bills*, 9 Metc. 1; *Frink v. Potter*, 17 Ill. 406; *Coal Co. v. Healer*, 84 Id. 126; *Smith v. Railway Co.*, 30 Minn. 169; *Dimmey v. Railroad Co.*, 27 W. Va. 32; *Eckerd v. Railway Co.*, 70 Iowa, 353; *Solomon v. Railway Co.*, 103 N. Y. 437; *Railway Co. v. Ware*, 84 Ky. 267; *Reary v. Railway Co.*, 40 La. Ann. 32; *Rose v. Railway Co.*, 12 Atl. Rep. 78.
2. A carrier of passengers is not an insurer of their absolute safety. If a danger that could not be foreseen is encountered, the carrier cannot be held responsible for damages from it; citing *Railroad Co. v. Pillsbury*, 123 Ill. 9.

H. C. Wisner, for plaintiff, contended:

1. If one by actual negligence, or by failure to perform his duty to me, places me in a position where I may reasonably apprehend danger, and if, acting under the natural impulse received from the situation, and exercising ordinary care under the circumstances, I avoid the danger, and am injured, he is responsible for the injury, although had I not so acted I would not have been injured; citing Ang. Carr. §§ 547, 548; 2 Thomp. Neg. 1092; Shear. & R. Neg. § 28; *Stokes v. Saltonstall*, 13 Pet. 181; *Coal Co. v. Healer*, 84 Ill. 126; *Frink v. Potter*, 17 Id. 406; *Ingalls v. Bills*, 9 Metc. 1; *Railroad Co. v. Paulk*, 24 Ga. 356; *Wilson v. Railroad Co.*, 26 Minn. 280; *Railroad Co. v. Mowery*, 36 Ohio St. 418; *Buel v. Railroad Co.*, 31 N. Y. 314; *Twomley v. Railroad Co.*, 69 Id. 158.
2. A carrier must use at least ordinary care to preserve order and to prevent the commission of violence or of nuisances on his vehicle; citing Shear. & R. Neg. (4th ed.) § 512; *Flint v. Trans. Co.*, 34 Conn. 554.
3. It certainly is settled that appearances, exclamations, and descriptions of pain are competent in an examination to ascertain the condition of an injured person; citing *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Id. 49; *Mayo v. Wright*, 63 Id. 42.

SHERWOOD, C. J. Mrs. Ashton, the plaintiff in this case, on February 10, 1887, lived on the south side of the Milwaukee railroad, near Ferry avenue, in the city of

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Detroit, and was about 52 years of age. On the evening of that day, between 7 and 8 o'clock, she took a Russell-street car, at the corner of Brush and Alfred streets, to go to her home, which was a short distance beyond the end of the line, on Ferry avenue. The barns on Ferry avenue were some distance from the end of the line, and, when the car approached the barn, instead of carrying plaintiff on to the terminus of the line, the driver turned and drove the car into the barn a number of car-lengths, and when she left the car in the barn she was assailed by a man at the barn, who laid hold of her, and made indecent proposals to her, until she broke away from him, and ran to her home, thereby escaping from his further violence and insults.

The plaintiff further claims in her declaration that, on May 23 next following, she was again a passenger on this same line of cars, between 6 and 7 o'clock in the evening, at which time it was light outside. This time, as before, she intended to ride to the end of the line, and again the car turned into the barn, as it had on the evening in February. She remembered her experience at that time, and rang the bell to stop the car. Finding that it did not stop, she waited a second, and then went out on the rear platform, and got off while the car was in motion, being thrown by so doing, and injuring her knee. It was at this time so light that she could see far into the barn. For the injury to the knee she brought suit, and (after a demurrer to the declaration had been overruled) on the trial recovered $500. When she rang the bell the driver looked back, but drove on, not heeding the bell or making any effort to stop the car. The plea was the general issue. Defendant brings error.

Nine errors are assigned. The first is to the overruling of the demurrer. The defendant did not choose to stand

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on this, but pleaded issuably after it was overruled, and we cannot consider this further.

When Mrs. Ashton was on the stand as a witness she was asked (referring to her experience on February 10 in the barn):

"Will you state to the jury what happened when you alighted from the car in the barn?"

This was offered as a reason for justifying her leaving the car while in motion; to show that the place to which she was being taken by the company was one not only improper for ladies, but to the plaintiff it had proved to be dangerous. This is the second error assigned. The circuit judge was right in receiving the testimony. The fact that the driver did not respond to the ring of the bell was to the lady a suspicious circumstance, and to what extent she had cause to fear and did fear danger approaching as she neared the barn were proper subjects for the consideration of the jury, and were properly left to them.

The third error assigned was to the plaintiff's testifying that she had fear of insult and injury if taken to the barn, and to the effect that the insult she received there before had upon her. I have no doubt of the competency and relevancy of this testimony as it was received.

The fourth error assigned relates to the statements of Dr. Gustin, who was called to treat the plaintiff for the injuries she received from her fall on leaving the car. He stated she complained of pain in the knee. He was then asked:

"How did she describe the pain?" and, "How did she act, if you can describe her actions, not telling what she said?"

There could be no valid objection, in showing her injury, to making these inquiries. The physician could only inform the jury of her condition from what she told

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him and what he saw himself, and the conclusion he reached from the examination he made, and the questions called for no more than this, and the answers were entirely proper. I think the question here raised was substantially passed upon in *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Id. 49; *Mayo v. Wright*, 63 Id. 44 (29 N. W. Rep. 832).

Mr. Joseph Ashton, the husband of plaintiff, was sworn in the case and examined in behalf of plaintiff. He testified that he called at the barn the next morning after his wife was hurt, and saw the superintendent of the barn, and told him of the injury to his wife, and told him she would sue the company if she did not get better, and the superintendent said to him:

"I don't care how quick she sues."

He also testified that he called at the barn the night the accident occurred, after his wife had got home and told him of her injury, and saw some one come in the barn that he supposed to be the watchman, and asked him for the superintendent, and something as to the cars there, and what cars had gone out, and told about his wife being thrown from the car. This testimony was all objected to by counsel for the defendant, and is made the subject of defendant's fifth, sixth, and seventh assignments of error.

It is a little difficult to see in what manner the defendant could have been prejudiced by anything that was said on these occasions referred to. It certainly could not jeopardize the defendant's interests to give its agents notice that a lady had been insulted upon its premises, or that the plaintiff had sustained injury on its cars through the negligence of its servants in failing to stop the car at the proper place, and allow her to alight, and this was the substance of all the testimony objected to.

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It may have been irrelevant, and erroneously received, but, so far as I have been able to discover, the error was a harmless one.

The defendant's eighth assignment of error relates to the rulings of the court in refusing to give the following six requests to charge:

"1. The jury are instructed that, under the pleadings and proofs, the plaintiff cannot recover.

"2. The rule of law is that to justify the plaintiff in descending from a moving car, and taking the risk of injury incident thereto, and, in case of injury resulting therefrom, hold the defendant liable therefor, such act must be for the purpose of avoiding an actual impending danger produced by the defendant for which it would be legally responsible, and the insult to the plaintiff on the evening of February 10 was not sufficient in law to justify the plaintiff in the belief that she was avoiding an actual impending danger, produced by the defendant, in descending from the car on the evening of May 23, as testified to by her.

"3. The mere act of turning the car into the barn would not justify the plaintiff's getting down from the moving car, and if the jury should find that on February 10, 1887, plaintiff had been insulted in the street-car barn by some unknown person, it would not in law be sufficient to justify her in descending from the moving car in the manner and under the circumstances testified to, and the defendant cannot be held liable therefor.

"4. Under the pleadings in this case, there can be no recovery on behalf of the plaintiff.

"5. The jury is instructed that even though they should believe that the plaintiff was insulted by some unknown person in the defendant's barn on the evening of February 10, as testified to by plaintiff, still that would not be sufficient in law to make the company liable for the injury sustained, if any, by getting off the car as testified to by her, on May 23.

"6. The plaintiff must show that the driver of the car on which she was riding, or the defendant, knew that she had been insulted on February 10 in the barn, and that there was reasonable ground for believing that, if she again went into the barn on May 23, she would be subject to some danger of like character."

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The last error assigned is to that portion of the charge of the court reading as follows:

"If the plaintiff, on the evening of February 10, was carried by the car into the barn, and there assaulted as testified to by her, and, on account of that treatment, on the evening of May 23, seeing the car leaving the main track, and again turning to go into the barn, and she had reasonable cause to fear danger to herself, or a repetition of such treatment, and, controlled by such fear, to save herself, she attempted to get off the car while in motion, using such reasonable care and caution as she was able to use under the circumstances, and was then injured, the defendant is liable for the injury. That is true, gentlemen of the jury. If, as I said before, she used that reasonable caution at this time and place, as testified to by her, and she used that reasonable caution which a prudent person would use under the circumstances, fearing a repetition of the assault that was committed on February 10, then, gentlemen of the jury, of course that will remove the bar which otherwise would arise on account of what would be contributory negligence. She had a right to do it, and it was her duty to do it, if those things were so. If the defendant, by its wrongful act, put the plaintiff in a position where she had reasonable cause to apprehend danger to herself, she had the right to take such steps from said danger as, in her judgment, formed from the exigency of the moment, was best, and, if injured, defendant was responsible for the injury."

The first request was properly refused. The case was one for the jury.

In regard to the second request, I think whether or not the treatment the plaintiff received in the defendant's barn when she was taken there was sufficient to justify her belief that she was avoiding an actual impending danger, into which she was being taken, by leaving the car, was a question for the jury, and not for the court, and the request was properly refused. And what is here said applies with equal force to the defendant's third request, and equally justifies the ruling of the

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circuit court. In regard to the fourth request, as we have already said, the case was one for the jury, and the court would not have been justified in directing the verdict.

The fifth request should not have been given. Independent of other facts in the case, it does not properly present to the jury the subject to which it refers, and its tendency would be to mislead, rather than enlighten, the jury, and it was properly refused.

In regard to the sixth request, it was of no consequence what the car-driver or his employer knew or believed in regard to the insult offered to the plaintiff in defendant's barn on February 10. The real question is, assuming the testimony of the plaintiff to be true, what reasonable ground had she to expect she would receive insult or injury, and is she to be deemed negligent in doing the only thing which was left for her to do, by the action of the defendant, to avoid such insult and injury? The request was properly refused.

The court committed no error in giving the charge he did, contained in the last assignment. The case went to the jury under a fair and reasonable charge, and the record presents no error, and the judgment must be affirmed.

The other Justices concurred.

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MARQUIS D. TODD v. CYRUS EVERETT.

Principal and agent—Payment.

1. Where after the purchase from a brick company of the brick upon its yard, burned and unburned, the vendee allows the president of the corporation to manage the yard and sell brick as his agent, and collect the proceeds of such sales, he becomes such an agent that his contracts are binding upon the vendee if made in the due course of the business; and payments made to such agent by a purchaser of brick who had no knowledge of the change of possession under said first-named purchase are binding upon the principal.
2. Where, in such a case, the agent at one time agreed to receive wood of a purchaser to apply on the amount due for brick, and directed him to deliver the wood to a specified third party, but before such delivery countermanded the direction, and ordered the purchaser not to make such delivery, which he did notwithstanding such countermand, this cannot be considered as a delivery to the agent, and it is immaterial that the agent did not forbid the third person from taking the wood.

Error to Ingham. (Peck, J.) Argued November 1, 1889. Decided December 28, 1889.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Cahill & Ostrander, for appellant.

Kilbourne & Humphrey, for defendant.

[The briefs of counsel are confined to a discussion of the evidence, no authorities being cited.—REPORTER.]

MORSE, J. The plaintiff brought suit in *assumpsit* upon the common counts, in the Ingham circuit court, and filed the following bill of particulars:

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"CYRUS EVERETT,
"To M. D. TODD, Dr.
"To 84,900 brick at $4.50 per thousand, sold and delivered to and accepted by defendant, between March 14 and May 19, 1887 ..... $382 05"

The defendant pleaded the general issue, and gave notice that he would prove that he purchased the brick of one John Jordan, president of the Lansing Brick & Tile Company, who sold the said brick with the full knowledge, consent, and authority of the plaintiff, and that the amount claimed in the suit for the said brick was paid to said Jordan according to the terms of said purchase. The defendant had verdict and judgment in the court below.

Upon the trial the amount and value of the brick delivered and received by the defendant was agreed upon, and it was consented that the amount to be settled by the verdict of the jury, the payment of which was in dispute, was the sum of $178.25. The court charged that the burden of proof was upon defendant to show that he had made a lawful payment of this amount. The plaintiff claims that a verdict ought to have been directed in his favor, and also alleges other errors in the admission of testimony and in the charge of the court.

A brief statement of the claims of the respective parties, as shown by the proofs, is necessary. The plaintiff testified that he bought the brick of the Lansing Brick & Tile Company on August 28, 1886, and took a bill of sale executed by John Jordan, as president of the company. The bill of sale recited a consideration paid by plaintiff of $3,500, and by its terms sold and conveyed to him—

"All the stock of manufactured brick now on the yard of the said company at Lansing, amounting now to 1,700,000 brick, about 4-10 sword brick, 3-10 Penfield brick, 3-10 sand brick, belonging to said company, and now in its possession at Lansing."

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That he caused the delivery of the brick to defendant, who made some payments to him towards them; that defendant afterwards claimed an offset to the bill; said that John Jordan owed him; that plaintiff told him:

"I can't help that. If John Jordan owes you, you can get your pay of John Jordan. I can't pay his debts."

After this conversation, plaintiff claims that defendant made two payments on the brick.

The plaintiff under this contract only paid for 1,500,000 brick, there being some reserved, that had been sold before the bill of sale was made, and which were piled up on the yard. He only paid $3,000 for the brick. He testified, on cross-examination, that all the brick were sold either by himself or by Jordan, who was his agent for that purpose, and to whom he paid 65 cents per thousand for selling them; that until April, 1887, Jordan did the selling and collecting, except as Todd himself collected, or money was paid to him directly; that Jordan sold to defendant; that the brick were worth from $4.25 to $4.50 per thousand; that plaintiff did not sell any brick until Jordan went away; that he would have made a nice thing out of it, if there had been 1,500,000 brick; that they fell short, and he never received his purchase money back; that there was an arrangement between himself and Jordan by which, after selling the brick, the money received over and above the $3,000, and the 65 cents per thousand for selling, was to be divided between them. He did not tell Everett, or any one else, that he owned these brick, but claims that Everett knew he owned them. He further testified that the 1,700,000 brick mentioned in the bill of sale were all the brick upon the yards as estimated at the time it was made, and that it was intended to cover all the brick in the yard, whether fully manufactured or not,—the unburned as well as the

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burned brick,—and, at the end of the burning season in 1886, all the brick were considered and treated as the property of plaintiff.

The defendant testified that he contracted for the brick with Jordan in November, 1886. Jordan came to him, and wanted to buy some dry wood. Defendant wanted some brick, and made an arrangement to deliver to him 100 cords of wood and 200 bushels of corn, and take it out in brick. Also sold him some wood that he had on hand. The brick were to be delivered in the spring. Defendant delivered the wood to Jordan, and nearly all the corn,—all that Jordan wanted; also delivered him some oats. He did not know that Todd had anything to do with the brick until May 13, 1887, when plaintiff sent him a bill for them. He then informed plaintiff of the arrangement he had made with Jordan. Plaintiff said he would allow him for the corn, but he would not apply the wood. Defendant testifies that plaintiff said he had advanced money on the brick, and did not think he would be able to get it all out. On cross-examination defendant testified that he did not deliver the 100 cords of wood to Jordan personally, but to one Stabler. Claims that Jordan told him he had sold it to Stabler, and to deliver it to him, but, before Stabler had taken the wood, Jordan came to him again, and told him not to let Stabler have it; nevertheless, he delivered it to Stabler. This wood came to $125. Stabler, against objection, testified that he bought the wood of Jordan, and that Jordan never objected to his getting it,—never made any objection to him; that the only objection made was by defendant, who said that Jordan had told him not to deliver it.

There was also testimony on the part of the plaintiff tending to show that the brick were turned over to plaintiff by the Brick & Tile Company before the defend-

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ant made his arrangement with Jordan, and that he had taken possession of them; but no one notified defendant of this change of possession, and there is no evidence that he knew of it. Defendant made a cash payment to plaintiff of the balance due over and above the value of the corn, oats, and wood delivered to Jordan, as he claims, at Jordan's direction. If the payments in grain and wood and some small items are allowed, the brick were fully paid for.

Upon these facts the plaintiff claimed that his title to the brick was an absolute one, and that he was entitled to have a verdict for the balance, $178.25, directed by the court; if not, that he was at least entitled to the following requests which his counsel submitted:

"2. When in November, 1886, the time defendant claims the bargain was made, all the brick on the yards of the Lansing Brick & Tile Company had been turned over to Mr. Todd as his brick, and Todd had taken possession of them, the bargain made in November could not affect the title to these brick, and defendant must pay for them to Mr. Todd.

"3. If there was a substantial falling off in the quantity of brick estimated to be on the yard when the bill of sale was made to Todd, it was the duty of the Lansing Brick & Tile Company to make the shortage good.

"4. There was not, and has not been, a delivery of the 100 cords of wood to Jordan. Everett has placed the wood where Mr. Jordan cannot get it. He has given the wood, contrary to Mr. Jordan's instructions, to Mr. Stabler."

The defendant claimed that, under the arrangement to which the plaintiff himself testified on cross-examination, the bill of sale was not absolute, but simply a security for the payment of the $3,000 advanced to Jordan, and therefore a mortgage, and that the plaintiff could not maintain *assumpsit* for the brick sold by Jordan, the mortgagor apparently being in possession. He also claimed that the bill of sale included nothing but brick manufact-

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ured at its date, and that quite an amount of the brick purchased and received by him were pressed and burned after the bill of sale was given. Even if Todd was found to be the absolute owner of all the brick, the fact that Jordan was selling all the brick, and running the yard apparently the same as he had before, the defendant claims, would justify him in making payments to Jordan, from whom he purchased the brick.

The court charged the jury that, if the title of Todd was not absolute in the brick, he could not recover in this particular action the balance alleged to be due. This was erroneous. Under the showing of plaintiff, which was not disputed by any testimony, he was the absolute owner of all the brick. If the brick exceeded a certain amount, then he and Jordan were to divide the proceeds of the balance between them; but the brick did not reach that certain amount, and the whole of the brick had been turned over to plaintiff before the sale to defendant, and he was in the possession of the same. But the defendant did not know of this change of possession, and it appears from the testimony of the plaintiff that while Jordan remained he (Jordan) managed the yard and sold the brick, as plaintiff's agent, at 65 cents per thousand. Jordan not only sold brick, but collected the proceeds of his sales, and was permitted and authorized to do so by plaintiff. Jordan was therefore such an agent that his contracts were binding upon plaintiff if made in the due course of the business. The corn was delivered at the yard, and plaintiff was at one time willing to receive it upon the brick. The wood was wood ordinarily used in the burning of brick, and the only question as to its applicability upon the contract for brick was the fact of its delivery.

The fourth request of the plaintiff should have been given. The wood was never delivered to Jordan. It was

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left where it was cut. Jordan at one time told defendant to deliver it to Stabler, but before it was so delivered he countermanded this direction, and ordered defendant not to let Stabler have it. The defendant, if he did not deliver it to Stabler, permitted him to take it in violation of Jordan's express command. This could not be considered a delivery to Jordan. The fact that Jordan never told Stabler not to take the wood, cuts no figure. Stabler knew when he took the wood, and so testifies, that Jordan objected to his taking the wood, and that he had notified defendant not to let him have it. The testimony of defendant and Stabler shows no right in Stabler to take it. There is an account of $10 for dry wood, which, under the testimony of defendant, should be applied upon the brick. There were several other little items claimed as payments which were properly submitted by the court to the jury.

The second request of the plaintiff was properly refused in the shape it was presented, but we think that the evidence fairly showed, and was practically undisputed, that all the brick, burned and unburned, were turned over to the plaintiff before defendant made his bargain with Jordan, and that, therefore, the plaintiff was entitled to recover of defendant the value of the brick, less the payments that were made in good faith to Jordan. All these items of payment were properly submitted to the jury, except that of the 100 cords of green wood, which should have been excluded.

Under the evidence as shown in the record before us, the question of manufactured or unmanufactured brick became immaterial, and there was no necessity of burdening the jury with it. If, as the testimony showed without contradiction, the Lansing Brick & Tile Company turned the yard and all the brick thereon over to plaintiff, before defendant bought or bargained for his brick,

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then whether the brick received by defendant were burned or unburned, at the time the bill of sale was made, was entirely immaterial.

The judgment will be reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

CLARE M. BEACH ET AL. v. JASPER W. DAVIS.

Assignment for benefit of creditors—Replevin from assignee.

In this case an assignee under an assignment for the benefit of creditors, after having taken possession of the assigned stock of goods, and while engaged in inventorying and appraising the same, assumed to surrender the actual possession to the holder of a chattel mortgage on the goods made the day prior to the assignment, and by agreement between them the inventory was to be completed, and, after a portion of the goods had been replevied from him and the mortgagee by creditors, the assignee filed said inventory and appraisal, which included the goods so replevied, and gave the statutory bond for double the appraised value of the assigned property; and the assignee is held to have been properly made a party defendant in the replevin suit, which was discontinued as to the mortgagee, and prosecuted to judgment against the assignee as sole defendant. *Coomer v. Mfg. Co.*, 40 Mich. 692.

Error to Tuscola. (Beach, J.) Argued November 5, 1889. Decided December 28, 1889.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

T. W. Atwood and *T. C. Quinn*, for appellant, contended:

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1. It was undisputed that Mr. Bray was in possession of the stock under his chattel mortgage at the time the writ was issued and executed, and no evidence was introduced to impeach the validity of said mortgage, which was conceded to be valid, and the court should have directed a verdict for the defendant; citing How. Stat. §§ 8315, 8321; *Belden v. Laing*, 8 Mich. 503; *Clark v. West*, 23 Id. 247; *Hunt v. Strew*, 33 Id. 85; and in any event, to warrant a recovery as against defendant Davis, he must have been in possession of the property when the suit was commenced; citing *Gildas v. Crosby*, 61 Mich. 413, and cases cited.

Charles S. Smith (Dickinson, Thurber & Stevenson, of counsel), for plaintiffs, contended for the doctrine stated in the opinion, citing the authority therein referred to.

SHERWOOD, C. J. This suit is replevin to recover a quantity of goods sold by the plaintiffs to one Benjamin Netzorg. The plaintiffs claim the right to rescind the sale and recover the goods in this action on the ground that Netzorg fraudulently made the purchase, which was upon credit.

In the fall of 1888, Netzorg was doing a mercantile business at Vassar, in Tuscola county. The plaintiffs, some time during the fall, sold Netzorg a bill of rubber goods, amounting to about $500. Afterwards, on December 3, 1888, Netzorg gave Robert V. Bray a chattel mortgage for $3,000 upon the entire stock of goods in his store, which included the goods bought of plaintiffs. This mortgage he claimed to have given to secure an indorser of his note to that amount; the indorser being said Bray. In the afternoon of the same day, Frank L. Fales, who prepared the said chattel mortgage, went to Caro, where defendant Davis resided, and made an arrangement with him to act as assignee in an assignment which Netzorg proposed to make for the benefit of his creditors; Netzorg having purchased upon credit from other parties besides plaintiffs goods to the amount of about $25,000, and

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which indebtedness was then all unpaid. It was also further arranged beween Mr. Netzorg's attorney and Mr. Davis, on this occasion, that the attorney should prepare the assignment with Davis as assignee, and should take it to Vassar the next morning for execution. Before Fales went to Caro, Netzorg told him he would have to make the assignment. Fales, on his return to Vassar at about 6 o'clock in the evening, prepared the other chattel mortgages,—one to A. Krolick & Co., for $202.15; one to Samuel Swartz, a clerk of Netzorg, for $333; and one to Henry Jacobson, who was another clerk, and brother-in-law of Netzorg, for $650. These mortgages were all made payable in 30 days. The mortgage to Bray was filed December 3, at 7 P. M.; the one to Krolick, December 8, at 8 P. M.; that to Swartz, December 3, at 9 P. M.; and that to Jacobson, at 9 P. M., of the same day.

Davis came to Vassar the next morning, December 4, and, under the arrangement made, the assignment was executed to him; and, accepting the trust immediately, he went into possession of the goods thereunder. On December 5, after Davis had retained possession of, and asserted his title to and possession of, the goods for two days, during which time he had procured appraisers to appraise the stock under the assignment proceedings, and the appraisers had partly completed their labors, Bray demanded possession under his chattel mortgage, which Davis surrendered to him. At the time that Davis so surrendered possession to Bray, it was agreed between them that the appraisers who had been selected to make the inventory and appraisal under the assignment proceedings should continue their work and complete their inventory and appraisal, to ascertain whether there was anything in the property above the chattel mortgages referred to; and, after part of the goods had been replevied by creditors, he (Davis) filed the inventory and appraisal,

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and executed a bond to cover double the appraised value of the entire stock of goods, including those involved in this suit and the others replevied, a detailed inventory of which he was unable to procure; and in the certificates attached to the inventory and other papers he filed in the clerk's office was contained this statement:

"The amount of goods, rights, and chattels referred to in the annexed assignment, which were turned over to Jasper W. Davis, as assignee, by virtue of said assignment, and with the goods, rights, and chattels heretofore appraised, which were replevied from the assignee before an inventory could be procured on said assignment, and which said assignee claims by virtue of said assignment, subject to any mortgages on the same, is of the sum of $3,883.00, as per appraisement of the same by the sheriff and his deputy, made and attached to the several writs upon which the same were taken, an itemized statement of which could not be procured in time to file herewith. * * * The actual value of the merchandise, goods, furniture, and fixtures, as per the foregoing appraisement, is $3,746.02, and the actual value of the goods replevied, as near as may be, is $3,883.00."

At the commencement of the trial, Bray, who held his chattel mortgage upon the property, was impleaded as defendant with defendant Davis. Upon the trial the case was discontinued as to him, and allowed to proceed against Davis alone. The suit was commenced on December 7, 1888. On the trial, defendant's counsel conceded—

"1. That the goods described in the writ of replevin in this cause were sold by the plaintiffs to Benjamin Netzorg, and that the goods taken under the writ were a part of the same goods.

"2. That such goods were purchased under such circumstances as to render the purchase fraudulent."

The sole contention of counsel for defendant Davis was that he (Davis) had no such connection with or control over the property as warranted the plaintiffs in making him a party defendant in the writ sued out, and

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the testimony introduced was directed mainly to that question.

On the foregoing facts the counsel for plaintiffs insisted upon their right to recover; and the court, agreeing with counsel, so held, and directed the verdict for the plaintiffs.

We think this direction was right. Davis did not lose his right to possess and control the property. Neither had the mortgagee any right to such possession, and never had it; and, as has been well said by Judge MARSTON in *Coomer v. Manufacturing Co.*, 40 Mich. 692,—

"Where property has been included in an assignment, the actual possession thereof cannot be so manipulated between the assignor and assignee as to deprive, or to render uncertain, the rights and remedies of third persons claiming title thereto."

The judgment should be affirmed.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred LONG, J., did not sit.

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FLETCHER OSBORNE v. FREDERICK LINDOW, SUPERVISOR OF THE TOWNSHIP OF CHINA.

Mandamus—Boundary-stream bridges.

1. Act No. 62, Laws of 1889, which sought to make provision for boundary-stream bridges, was before the Court in *Township Board v. Supervisors*, 75 Mich. 264, and we found ourselves unable to enforce it, and our attention has not been called to any statute that effectually secures the right to have such a bridge built.

2. Relator applied for *mandamus* to compel respondent to place on the assessment roll so much of private claim 306 as lies south

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of the town line between China and St. Clair townships and west of Pine river and of the corporate limits of the city of St. Clair. The reason given for relator's interference is that there was formerly a bridge across Pine river on the township road between China and St. Clair, on the west side of Pine river, which communicated with the city of St. Clair, lying on the east side, which is now destroyed, and cannot be rebuilt, because of the dispute as to the township in which the west end of it would lie; that respondent claims the land belongs to East China, whereas the relator claims it is in China; that relator uses the road, and he and his neighbors need the bridge to get conveniently to the city. It does not appear whether the bridge had a draw or not. The Court hold that relator's purpose cannot be reached by *mandamus* proceedings, and suggest that the controversy can be amicably determined.

Mandamus. Submitted November 12, 1889. Denied December 28, 1889.

Relator applied for *mandamus* to compel respondent to place on the assessment roll of his township certain land alleged by relator to be within the legal boundaries of said township, which remedy is denied as being inapplicable to the case. The facts are stated in the opinion.

Stevens & Merriam, for relator.

P. H. Phillips, for respondent.

CAMPBELL, J. This is an application for a *mandamus* to compel respondent to place on the assessment roll so much of private claim 306 as lies south of the town line between China and St. Clair and west of Pine river and of the corporate limits of the city of St. Clair. The reason given for relator's interference is that there was formerly a bridge across Pine river on the town-line road between China and St. Clair, on the west side of Pine river, which communicated with the city of St. Clair, lying on the east side, which is now destroyed, and cannot be rebuilt, because of the dispute as to the township

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in which the west end of it would lie; that respondent claims the land belongs to East China, whereas relator claims it is in China; that relator uses the road, and he and his neighbors need the bridge, to get conveniently to the city. It does not appear whether the bridge had a draw or not.

The return does not admit the correctness of relator's map, and also claims that the land belongs in East China, under the law setting off that township. The order to show cause was allowed on the supposition, naturally arising from the affidavit, that the dispute was not a very serious one. But the return raises important issues of fact, as well as of law, and indicates much more serious difficulties than were suggested or argued. We have found in our own investigation of the statutes that it would be impossible to dispose of the controversy without a knowledge of several matters on which we are given no light whatever. We have found, also, so much confusion and blindness in the legislation on the subject that, while we have tried to trace out all the laws, not only from indexes but otherwise, we do not feel sure that something may not lurk where we have not found it, and we feel the more doubt because counsel on both sides have assumed one important boundary as existing which we have found no statute to warrant. A brief statement of the statutory history, as far as we know the facts, will indicate better what is obscure and needs explanation. It is perhaps necessary to state that we have no right to introduce into this case as fixed facts what may have been determined by us in a controversy between private parties, who are strangers to this record.

It appears from so much of the maps as is not disputed that until they approach the St. Clair river, within not far from two miles, China and St. Clair townships

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are separated by the line between the fourth and fifth rows of townships north of the base line. It also appears that the line between ranges 16 and 17 east is so near St. Clair river as to create quite narrow fractional townships, which are in some places less than a mile in width. Pine river enters St. Clair river, apparently not far from where the line between the fourth and fifth rows of townships would, if extended, strike St. Clair river. In coming towards St. Clair river from the country inland, the maps indicate that it runs from town 5, of range 16, in a somewhat winding course, a few degrees east of south, across what would in a regular township be section 1, and then returns through the same section, and across the township line, in a similar irregular course, with a general northerly direction for not far from a straight distance of a mile and a quarter, when it doubles on itself, in a long ox-bow, southward, and by further sinuosities works north-eastward to its mouth. Four old private claims, numbered 304, 305, 306, and 307, border on or include the river up for several miles, to where it enters claim 307 from the north, where that claim touches section 26 in township 5 north, of range 16 east. Of these claims, 304 is the south-easterly one, bordering on St. Clair river, longest from north to south. Claim 305 lies north of it on the river, longest from east to west. The mouth of Pine river is at or near the dividing line between them. Claim 306 is a rectangular claim lying to the north-west of 304, and joining it, with the same northern and southern boundaries. The south-westerly corner of 305 is some distance eastward from the north-west corner of 306. Claim 307 lies further to the north-west, adjoining claims 305 and 306, and having, by reason of the jog between the west boundaries of 305 and 306, its northerly half longer to that extent than its

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southerly half. All of these claims are bounded by lines rectangular to each other, except where St. Clair river forms the easterly line of 304 and 305. The lines do not run with the points of the compass, but are at an inclination of not far from 14 degrees, so that the general direction of the group approximates north-west and south-east. The result is that claim 307 is entirely within what would be the extended lines of township 5 north, of range 16 east. Claim 305 is within the extended lines of the same township, and also of township 5, of range 17 east. Claim 304 includes parts of four townships,—4 and 5 north, and 16 and 17 east. Claim 306 goes into townships 4 and 5 north, and 16 east, and whether it reaches range 17 is disputed. Judging from the maps, the east and west town line strikes 306 on its west side about half a mile southerly of its north-west corner, and reaches Pine river somewhat less than half that distance eastward from the line. Pine river enters 306 near its north-west corner, and leaves it near its south-east corner, but enters again on the east side, about two-thirds of the way up, and leaves at the north-east corner. All of these are rough estimates from maps that are not perfectly accurate. It appears, therefore, that both 304 and 306 extend northward a long distance over the ordinary township line.

In 1827 the township of Sinclair (since corrupted into St. Clair) was set out by the legislative council of the territory so as to include townships 4 and 5 in ranges 13, 14, 15, 16, and 17. It thus contained all four of the private claims referred to. 2 Terr. Laws, 478. In 1835 it was enacted—

"That all that part of the county of St. Clair comprised in surveyed township four north, ranges fifteen, sixteen, and seventeen east, be a township by the name of China." 3 Terr. Laws, 1368.

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Some doubt would seem to have arisen whether private claims, separately surveyed, were to be regarded as part of a township; for on March 31, 1838, it was enacted that all that portion of the county designated by the United States survey as township 5 north, of range 16 east, and also private claim 255, should be attached to St. Clair (Laws of 1837–38, p. 140), thus repeating the old description, which was sufficient but for the doubt. This left 304 and 306 in the same uncertainty; and on April 12, 1839, the lines were temporarily settled by making the north line of China coincide with the extension of the line between tiers 4 and 5 north of the townships to the national boundary line in St. Clair river. All the previous acts of the towns were legalized. Laws of 1839, p. 92. This course was exceptional, for it had not been customary to cut private claims in two in laying out townships; and, as the line was purely theoretical, and had no landmarks or surveys to indicate it on the ground, it was a source of uncertainty. On March 15, 1849, the town of Casco was set out from the west end of China, including township 4 in range 15. Laws of 1849, p. 88. At the same time the line between China and St. Clair was re-adjusted so as to put all of claim 306 in China, and to put the part of 304 north of a line running from the intersection of Pine river with George Palmer's south line east to the St. Clair river into St. Clair. Id. p. 106. Just where Mr. Palmer's line was does not appear; but it was probably the south line of the village plat of Palmer, afterwards called "St. Clair Village."

In 1850 the village of St. Clair was first incorporated. Laws of 1850, p. 219. All of the descriptions in the statute refer to lots on some plat not named, and to an engraved map made by J. G. Darby, of Buffalo. It seems to indicate that the village comprised parts of

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claims 305 and 304, and probably took in a little more of 304 than had been included before. This appears from an act on page 241 of the Laws of 1850, repealing the boundary act of 1849 far enough to except from China whatever land fell within the incorporated village.

In 1858 (Laws of 1858, p. 49) St. Clair city was incorporated so as to include more land than the village. As no change is said to have been made since affecting the boundaries now in dispute, it may stand as fixing them, as far as it goes. Besides including some lands to the north, it takes in the whole of claim 305. It then passed along the north line of 306 to the north-west corner of 304, and thence southerly, and again easterly, along the lines of certain outlots, to Pine river, and up that river to another lot line, running east to St. Clair river. In addition to this, it covered "all that part of private claim No. 306 which lies north and east of Pine river."

It is insisted by relator that this left no part of 306 in China, except so much as lay on the west side of the river, which is claimed to intersect the south end of the claim. But, however this may be, we have found no law annexing any of this west part to the township of St. Clair; and if this be so, then the town-line road must have stopped at the west side of the claim, and from that run through the town of China alone to Pine river, and left that end of the road entirely outside of St. Clair. Counsel on both sides overlooked this fact, as did also relator; and it is possible some action may have been taken which has escaped our notice. But it is very significant that, except for a short period, this claim has never been affected by the subdivisions of the regular linear survey of town lines.

In 1859 (Laws of 1859, p. 355), East China was set off from China in this language:

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"That all that part of the township of China, in the county of St. Clair, lying in fractional township number four, including private claims extending into range number sixteen, be, and the same is hereby, set off from the residue of said township and organized into a separate township, by the name of East China."

The question is whether claim 306 can be regarded as coming under this category. Unfortunately, the peculiar character of previous legislation has shown that we have no guide to the legal intent outside of the language as applied to undisputed facts.

If these private claims had been left intact by legislation, there would be strong reasons for holding that the private claims in ranges 17 and 16, being one compact body, were all meant to be placed by themselves, and separated from the lands described in sections. But they have been so cut up and mutilated that only parts of them could be, under any description, brought into East China. And we could hardly suppose that, being so dismembered, it would be a fair construction to bring into that township any lands separated from it completely by intervening territory. If a distinct issue of fact had not been made by the return, which leaves us no means of locating anything, we could have no difficulty in finding that it is hardly possible any part of claim 306 not within the city limits of St. Clair could reach within a long distance of the range line. The course of Pine river on the map furnished us indicates that there is no point of contact between claim 304 and the residue of 306 outside of the city. To reach it there would be a necessity of crossing the south fraction of section 1 in township 4, of range 16, which cannot belong to East China. If so cut off, we have no doubt it belongs to China; and, as the fact is easily to be discovered, it would be great folly to litigate it.

We can see no reason, however, for attempting to reach

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the case by these *mandamus* proceedings. Upon the issues made by the return, there are three townships interested in the controversy, and entitled to be impleaded in some way. East China is directly interested. It is of some consequence to the township of St. Clair whether the whole remnant of claim 306 is in China, as it seems to be.

It is also to be noticed that the only reason given by relator for intervening is to get a bridge built. Our attention has not been called to any statute that effectually secures any such right. The law of 1889, which sought to make provision for boundary-stream bridges, was before us in *Township Board v. Supervisors*, 75 Mich. 264 (42 N. W. Rep. 831), and we found ourselves unable to enforce it. As the purpose for which relator moves cannot be reached on the proceedings as they stand, there is no occasion to retain them. It would be easier to begin again, after correcting the misapprehensions existing on both sides, than to attempt to mend up this record. There appears to be no disposition on the part of respondent to avoid his duty; and, with the suggestions we have made, it can probably be determined amicably. But, if China and St. Clair have both acted under a mistake concerning their boundaries, it is possible legislation may be needed to have more definite boundaries intelligibly declared. That is beyond our province.

The *mandamus* must be denied, without costs, and without prejudice to any future proceedings which the parties may find advisable.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred.

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ALBERT B. HICKOX v. THE CHICAGO & CANADA SOUTHERN RAILWAY COMPANY AND THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Deed—Right of way—Defeasance.

A deed of right of way contained the following defeasance clause:

"If the said railway company, its successors or assigns, should fail to complete said railway through said premises, and to put the same in operation, within three years from the date hereof, or if, after such railway is completed and put in operation, it should cease to be used and operated as a railroad, then, in either event, this release shall cease to be operative, and the right of way granted thereunder shall terminate."

The railway company ceased to use the right of way except for the storage of cars, and it is held that thereupon the deed had no further force or effect.

Error to Lenawee. (Lane, J.) Argued November 12 and 13, 1889. Decided December 28, 1889.

Ejectment. Defendants bring error. Affirmed. The facts are stated in the opinion.

Weaver & Bean (*George C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellants, contended:

1. Is the deed made upon a condition subsequent? By its terms it so states, but it does not necessarily follow that such is its legal effect. Such conditions are not favored in law, and must be strictly construed; citing *Fraunces' Case*, 8 Co. 90*b*.

2. The deed contains no clause for a re-entry. This is not always essential, but there must be that or its equivalent; citing *Guild v. Richards*, 16 Gray, 317; and see How. Stat. § 5562, and *Barrie v. Smith*, 47 Mich. 130, construing it.

3. The grant was made in consideration of the sum of $1,400, paid the grantor by the grantee, and was not voluntarily made in consideration of certain supposed benefits to the grantors to be derived from the construction and operation of a railroad across the lands in question; citing *Horner v. Railway Co.*, 38 Wis. 165, 174; *Rawson v. Inhabitants, etc.*, 7 Allen, 125, 130.

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4. By the terms of the deed the land was to be used for the purpose of constructing and operating a railroad, not merely across these lands, but between Trenton and Fayette, which purpose would not inure specially to the grantor, but was in its nature general and public; hence it cannot be said that the deed, by its terms even, created an estate upon condition subsequent; citing *Horner v. Railway Co.*, 38 Wis. 165, 175; *Strong v. Doty*, 32 Id. 381; *Rawson v. Inhabitants, etc.*, 7 Allen, 125, 130; *Woodworth v. Payne*, 74 N. Y. 196.

5. It was error to allow the plaintiff to give testimony that he had pastured his cattle on the right of way. It did not tend to prove an entry for breach of condition; citing *Guild v. Richards*, 16 Gray, 319.

6. The condition, if relied upon to work a forfeiture, is construed with great strictness; citing Sedg. & Wait, Tr. Tit. Land, §§ 212, 213, and cases cited; 4 Kent, Com. 129; *Barrie v. Smith*, 47 Mich. 130; *Smith v. Barrie*, 56 Id. 318; *Merrifield v. Cobleigh*, 4 Cush. 178; *Hunt v. Beeson*, 18 Ind. 380; *Gadberry v. Sheppard*, 27 Miss. 203; *Bradstreet v. Clark*, 21 Pick. 389; *Hoyt v. Kimball*, 49 N. H. 327; *Page v. Palmer*, 48 Id. 385; *Larabee v. Carleton*, 53 Me. 211; *Bank v. Hastings*, 1 Doug. 226; *Emerson v. Simpson*, 43 N. H. 475; *McKelway v. Seymour*, 29 N. J. Law, 321; *Society v. Stark*, 34 Vt. 243; *Blanchard v. Railroad Co.*, 31 Mich. 43; *Voris v. Renshaw*, 49 Ill. 426; *Lynde v. Hough*, 27 Barb. 415; *Calkins v. Smith*, 41 Mich. 412; *Waldron v. Railway Co.*, 55 Id. 420; *Berkley v. Railway Co.*, 33 Fed. Rep. 794.

7. A substantial performance is sufficient; citing *Spaulding v. Hallenbeck*, 39 Barb. 79; *McKissick v. Pickle*, 16 Penn. St. 140; *Broadway v. State*, 8 Blackf. 290.

8. To work a forfeiture for non-user there must be such an abandonment of the use as to indicate an intention not to continue its use; citing *Poitevent v. Supervisors*, 58 Miss. 810; *Osgood v. Abbott*, 58 Me. 73; *Mills v. Seminary*, 58 Wis. 135; *Chapin v. School-dist.*, 35 N. H. 445; *Crane v. Hyde Park*, 135 Mass. 147.

Clement Carpenter and *Salsbury & O'Mealey*, for plaintiff, contended:

1. In the present case it is clear that what was contemplated by both parties was that the premises should be used as a part of the railroad's right of way, and operated as a railroad for the passing and repassing of trains, for carrying of freight and passengers, and that it was not contemplated by the parties that it should be used as a mere storage track. This view is

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supported by the following cases: *Smith v. Barrie*, 56 Mich. 314; *Sperry v. Pond*, 5 Ohio, 387; *Langley v. Chapin*, 134 Mass. 82; *Dorr v. Harrahan*, 101 Id. 531; *Linzee v. Mixer*, Id. 512; *Keening v. Ayling*, 126 Id. 404; *Gillis v. Bailey*, 21 N. H. 149; *McKissick v. Pickle*, 16 Penn. St. 140; *Gibert v. Peteler*, 38 N. Y. 165.

MORSE, J. In this case the defeasance in the deed of right of way of the plaintiff to the Chicago & Canada Southern Railway Company reads as follows:

"If the said railway company, its successors or assigns, should fail to complete said railway through said premises, and to put the same in operation, within three years from the date hereof, or if, after such railway is completed and put into operation, it should cease to be used and operated as a railroad, then, in either event, this release shall cease to be operative, and the right of way granted thereunder shall terminate."

We think that when this right of way ceased to be used and operated as a railroad, and was used only for the storing of cars, the defeasance became operative, and the conveyance had no further force or effect.

The judgment is correct, and is affirmed, with costs.

SHERWOOD, C. J., and LONG, J., concurred with MORSE, J.

CAMPBELL, J., (*dissenting*). Plaintiff sued in ejectment to recover land granted by him and his ancestor to be used for railway purposes, which he claims has reverted for breach of condition in not maintaining the line across it for the purpose of running the usual trains of freight and passengers. The court below held the condition broken, and the estate forfeited.

The case is substantially as follows: In 1872 the Chicago & Canada Southern Railway Company was engaged in building a railway from Detroit river to Fayette, in Ohio, not very far south of the state line. Its course took it through Lenawee county in a general direction of

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about south, thirty degrees west, crossing the Lake Shore & Michigan Southern Railway at Corbus, a station between two and three miles north-east of the land in question, and going through Grosvenor, a station about the same distance south-west. The Chicago & Canada Southern Railway continued to run its trains over the railway through both these places until 1879, when it became consolidated in business with the Lake Shore & Michigan Southern, which thereafter had charge of all the running arrangements. The Lake Shore & Michigan Southern had a track running between Corbus and Lenawee junction, more nearly east and west, which passed through two other stations between, and another track through Lenawee junction, passing through Grosvenor. In 1879 the Lake Shore & Michigan Southern, in runing from Detroit river to Fayette, used its own tracks between Grosvenor and Corbus, through Lenawee junction, and left off the use, for regular trains of the Canada Southern, of the space between Grosvenor and Corbus, on the original track of the latter, making no other change along either line. No station ever existed on the Canada Southern between Grosvenor and Corbus, which were the nearest stopping places to plaintiff's land on that line. The maps do not indicate the wagon roads, but, in actual distance, one or more of the Lake Shore & Michigan Southern road stations west of Corbus would seem to be about as near to plaintiff as Grosvenor or Corbus.

On August 23, 1872, plaintiff and his associates in title executed to the Chicago & Canada Southern Railway Company a warranty deed of the right to enter upon, construct, maintain, and operate its road in and upon the N. E. ¼ of the N. E. ¼ of section 16, the north ½ of the N. W. ¼ of section 15, and all that part of the west ½ of the S. W. ¼ of section 10, township 7 south, of range 5 east, that lies within fifty feet of the center line of said

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railway company's track, as the same is located on the S. E. corner of said W. ½ of said section 10, and to use and occupy for its railroad a strip of land 100 feet in width across said above-described premises as the same is now located thereon by said company, except 20 feet off the north side of said right of way from the highway 10 rods west; reference being had, for a more definite description of said strip of land, to the map of the route of said company, on file in the office of the register of deeds for said county of Lenawee; said company to construct one farm crossing with cattle-guards, and one crossing with gates, upon the above-described premises; also to construct a ditch, etc. The *habendum* clause is—

"To have and to hold said strip of land, for the uses and purposes aforesaid and incidental thereto, to said railway company, its successors and assigns, forever."

The condition is in these words:

"If the said railway company, its successors or assigns, should fail to complete said railway through said premises, and to put the same in operation, within three years from the date hereof, or if, after such railway is completed and put into operation, it should cease to be used and operated as a railroad, then, in either event, this release shall cease to be operative, and the right of way granted thereunder shall terminate."

The release was made for a money consideration of $1,400.

After the combination made in 1879, the Lake Shore & Michigan Southern ceased to run regular trains over the old right of way between Corbus and Grosvenor, over plaintiff's land; and that track has been used almost exclusively as a side track for storage of cars. There was testimony that it was kept in repair, on which there was some conflict, and since suit brought it has been used more or less for trains. There was also testimony, which does not seem to us of any importance on this issue,

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tending to show such conduct in regard to storage of cars and neglect of local neatness, and such failure to keep the ground in good order, as created annoyance in the enjoyment of the farming premises.

We have not been able to construe this deed as it appeared to the circuit judge. The doctrine is familiar that conditions of forfeiture are to be construed strictly, and cannot be enforced so as to destroy an estate, unless such is the necessary result from the language used; and our statutes have gone further, and forbidden the enforcement of forfeitures, unless the conditions are—

"Of actual and substantial benefit to the party to whom, or in whose favor, they are to be performed." How. Stat. § 5562.

The right granted was for the purpose of constructing, maintaining, and operating the railroad, and purposes "incidental thereto." The location of the strip of 100 feet is by reference to the map of the route of the company, which covered its line through the county, if not more, under the railroad laws; and the railroad itself is one thing, and not a series of detached parcels. Neither is a company confined to a single line of rails, but it may make such intersections, side tracks, and other conveniences as business may require. Places for storage and movement of cars are as necessary as any other facilities, and are a part of the maintenance of every road in the transaction of its business. Had this road kept up its trains on this cut-off between Corbus and Grosvenor, it could not be seriously claimed that a parallel side track, for the whole distance, could not be kept up, in the ordinary use of its right of way, for the purposes now complained of.

In order to arrive at the construction claimed by plaintiff, it is necessary to introduce two changes in the language of the condition, and add to the words "used and

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operated as a railroad," "by running its trains over the said strip of land." These are not unimportant changes.

The deed contains certain conditions for the benefit of the premises themselves, which are not secured by any forfeiture clause. One is the construction of two kinds of crossings; the other is the construction of an important ditch. It is obvious to any one that a failure to do either of these things might work serious mischief, and, therefore, that they, if made conditions, would be substantial. But they are not included in the defeasance at all.

The deed says nothing about the running of trains, but it does contemplate that the railroad shall not be abandoned. When we consider in what way a railroad would help the landholder, as we are bound to do in order to see whether the condition is of substantial benefit, we fail to see the force of the plaintiff's contention.

It is evident enough that the railroad referred to is the railroad which leads to the different *termini* at either end. It would do no good to any one to have a railway merely crossing plaintiff's land, and leading nowhere. It could only help him by being a thoroughfare, and could only help him then because he could get access to it somewhere. There is nothing in this deed which requires a station on or near plaintiff's farm. To reach it, he must resort to some station. As the road is now used, there has been no change in the stations, and all of them are as accessible as before. It has never been deemed a benefit to any one to have his land crossed by a railway, when no trains stop there. As a matter of common sense, it is a harm, and not a benefit, to have trains crossing one's premises, and substantial damages are granted for doing so. It is better for any one to have his neighbors' lands occupied, rather than his own, unless his own lands are made more accessible. If the

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deed called for the running of trains over plaintiff's land, it would be at least worthy of consideration whether such a condition was beneficial. But, with the general experience to the contrary, we do not think we are justified in adding such a condition to the language of the deed, for the express purpose of making it a cause of forfeiture.

We think the fair meaning of the clause confines the forfeiture to the substantial abandonment of a railroad, and not of a part of the use of the small fraction of it between Corbus and Grosvenor; and, further, that this particular part cannot be regarded as abandoned while it is used for the every-day necessities of a railroad in its course of business, as this is.

Dilapidation, and neglect in keeping the road on this strip in nice order, are not made grounds of forfeiture. If defendants allow or cause nuisances or other wrongs, the law has remedies which are adequate. There is no covenant or condition against using one or more tracks for any legitimate purpose, so long as the roadways and crossings and drainage are provided. Offensive articles are no more and no less a nuisance than if a track were used for running trains, and another, or more, for storage of cars, and abuses of all sorts can be redressed by other remedies.

We think the estate was not forfeited. The judgment should be reversed, with costs, and a new trial granted.

CHAMPLIN, J., concurred with CAMPBELL, J.

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CHARLES L. MESSMORE v. MICHAEL CUNNINGHAM ET AL.

Statute of frauds—Specific performance—Rights of subsequent purchaser.

1. The principle is well settled that, in order to satisfy the statute of frauds, the memorandum must contain the substantial terms of the contract, expressed with such certainty that they may be understood without resort to parol evidence.
2. The doctrine is well established that as between landlord and tenant, when the tenant is in possession at the date of the agreement to purchase, holding under the lease, continuance in possession is not an act of part performance to take the case out of the operation of the statute of frauds.
3. Where the bill and answer in a suit for specific performance make an enforcible agreement for the purchase of land, which, without the admissions of the answer, is void under the statute of frauds, the equities of the complainant *thus* established cannot override the legal title of an intervening purchaser with notice of the void contract, which the defendant had elected to treat as void by conveying the land to said purchaser.

Appeal from Sanilac. (Beach, J.) Argued November 5, 1889. Decided December 28, 1889.

Bill to enforce specific performance of a contract for the sale of land. Defendants Burbanks appeal. Reversed and bill dismissed. The facts are stated in the opinion.

Brennan & Donnelly and *John Divine,* for complainant.

Elbridge F. Bacon, for appellants.

CHAMPLIN, J. This is a bill of complaint to enforce the specific performance of a contract between Messmore and Cunningham for the sale of land.

The contract was as follows:

"MINDEN CITY, MICH., July 27, 1887.

"Cunningham to give q. c. d. of house and lots in

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Minden, and w. deed for one lot on Bostwick Ave., 2d or 3d lot next to the alley back of Waterman, in Detroit, and furnish a Burton abstract of this lot with the other seven lots owned at present by Messmore, in Detroit; Messmore to give $300 in cash, and the horse Gypsy, which is now owned by Messmore, and to pay the taxes on said h. and lot. CHAS. L. MESSMORE.
"M. CUNNINGHAM."

Underneath the contract was the following:

"House and lots mentioned are lots five and six, in block three, of Haviland's addition to Minden."

Messmore testified that the above was written under the contract when the parties were both present, after it was signed, and before it was delivered. Cunningham testified that it was written upon the contract after it was delivered. The complainant in his bill further states as follows:

"Complainant further shows that, at the time of his purchase of said lots five and six in Minden, as aforesaid, the said Cunningham was indebted to complainant in the sum of one thousand dollars, with interest, and that the payment thereof was secured to complainant by mortgage upon said lots five and six, of said Minden, and that the sale of said lots five and six by said Cunningham to complainant, as aforesaid, was of his interest only in said lots five and six, and that the fulfillment of the said contract by the said Cunningham, by execution and delivery to said complainant of said deeds as provided by said contract, was to be a payment to complainant of said mortgage; that the offer to sell his interest to complainant in said lots by the said Cunningham was, as complainant is informed and believes, for the purpose of paying said mortgage,—he, the said Cunningham, informing complainant at the time of the making of said contract that he desired to make said conveyance for that purpose, as it was more convenient to pay said mortgage by a sale to complainant than in any other way."

It thus appears from complainant's own showing that a very material portion of the agreement is not contained in the writing, but rested in parol. The principle is

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well settled that, in order to satisfy the statute of frauds, the memorandum must contain the substantial terms of the contract, expressed with such certainty that they may be understood without resort to parol evidence.

It is plain that this contract or memorandum does not comply with the statute. The complainant, however, seeks to avoid this difficulty by showing a part compliance. He alleges that he entered into possession under the agreement, and has made valuable improvements thereon. As to his entering into possession, it appears that he was, and for some time previously had been, in the possession of the house and lot in Minden City as a tenant under Cunningham, and he continued to reside upon the premises after the agreement was made. The lease was not surrendered, although afterwards complainant made a memorandum thereon as follows:

"Cunningham lease. House, lots, and place bought July 27th, 1887;"—

And he testified that after that he occupied as owner, and paid no more rent. But we think the doctrine well established that as between landlord and tenant, when the tenant is in possession at the date of the agreement, holding under his lease, continuance in possession is not an act of part performance. Wood, Stat. Frauds, § 193, and cases cited in note 3.

There may be cases where the rule would not apply,—when some change in the circumstances or business arrangement of the parties, or one of them, would make it inequitable to hold to the general rule; but such is not the case here. The claim of having made valuable improvements is not sustained by the proofs. He merely made some slight repairs to the roof to prevent it from leaking, and nothing more than a tenant would be bound

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to do. No part of the consideration has been paid. He did not surrender the evidence of indebtedness secured by the mortgage, nor release it, nor discharge the mortgage.

Cunningham refused to convey, alleging, as an excuse, that his wife would not join in the deed. On August 26, 1887, Cunningham and his wife executed and delivered to Fanny R. Burbanks a warranty deed of the Minden City lots, subject to the mortgage to Messmore for $1,000, which she assumed and agreed to pay as part of the consideration for the deed. The balance of the consideration was agreed upon as $200 in money, a gold watch, and a horse. The watch was delivered, $199 of the money was paid over, $1 being retained by Mr. Bacon for drawing the deed. The horse has not been delivered.

This deed was the result of negotiations entered into between Frank E. Burbanks, the husband of Fanny, and Cunningham, immediately after the memorandum was entered into between Messmore and Cunningham; and, under the testimony, we think it clear that Burbanks had notice of the agreement between Messmore and Cunningham, but insisted that it was invalid, and did not prevent Cunningham from selling to him. Cunningham agreed to sell, and Burbanks directed the deed to be made to his wife, which was done. Cunningham answers separately, and admits the facts stated in complainant's bill to be true. The bill and his answer make an agreement which could be specifically enforced as between him and Messmore, and raises the singular question whether the equities of Messmore can override the legal title of an intervening purchaser with notice of a contract void under the statute of frauds. I think it cannot. At the time Cunningham conveyed to Mrs. Burbanks, who was a purchaser for value, the agreement between Messmore

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and Cunningham was void, at the option of Cunningham. By conveying to Burbanks for value he elected to treat it as void. He has received a part of the consideration, and can enforce the whole, and it would be a fraud for him, after conveying away his title, to infuse life into the void contract, so as to enable him to receive the consideration from Messmore or to invalidate a legal contract he has made with Burbanks. This view entails no hardship upon Messmore. He has parted with nothing. He retains his mortgage upon the place, and the money and horse which he had agreed to give Cunningham for a deed of the place.

I think the decree should be reversed, and bill should be dismissed, with costs of both courts. The defendants ask the benefit of a cross-bill in their answer, and ask for a decree declaring the contract void, and as a cloud upon Fanny Burbank's title. We have come to the conclusion that it is void, and that it does not constitute a cloud upon her title.

SHERWOOD, C J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

ALLAN SHELDEN ET AL. v. JAMES ERSKINE ET AL.

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Mortgage—Delivery—Security for several creditors—Deficiency on foreclosure.

1. Where a mortgage has been delivered to become operative, a separate delivery is not necessary to every one named in it, but delivery to one is delivery to all, unless there is some reason to the contrary.

So *held*, where a mortgage was executed to a number of

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creditors, conditioned for the payment of a given amount, in specified sums, to each creditor, and was accepted by a portion of the mortgagees, and was never repudiated by the others, on whom it imposed no burden.

2. Under such a mortgage, which contains no personal covenant, and does not purport to secure the payment of the sums specified according to existing terms and conditions, but which created in every case a *new* principal, none of the mortgagees can claim to be secured for any greater sum than the one named in the mortgage.

3. There is no practice which authorizes parties to come in and prove their cases, except in the regular course of the cause. A practice has sometimes been followed—how regularly we do not now inquire—of advertising, under receiverships and other cases of administration of funds, for persons to come in and prove their claims. But in the present case the mortgage is for definite parties, and the time for them to come in was before hearing, so that any inquiry needed might be made in due time, by the ordinary examination and cross-examination of witnesses, and the proved debts should have been decreed to be paid at once out of the proceeds of sale of the mortgaged premises.

4. The absence of a personal liability clause in a foreclosure decree is no ground for appeal, unless the decree goes further, and declares that no such liability should exist.

5. The jurisdiction to decree the payment of a deficiency on a foreclosure sale is statutory, and limited to cases where the mortgage is given to secure a written obligation, which must itself be capable of legal enforcement, and also not outlawed (*Ins. Co. v. Brown*, 11 Mich. 265); and it is to be exercised, and the trial of liability had, on a new hearing, after the deficiency is reported. Any decree for payment made in advance of sale is, at best, no more than declaratory, and can fix no rights.[1] *Johnson v. Shepard*, 35 Mich. 115; *Howe v. Lemon*, 37 Id. 164; *Gies v. Green*, 42 Id. 107; *Mickle v. Maxfield*, Id. 304; *Ransom v. Sutherland*, 46 Id. 489; *McCrickett v. Wilson*, 50 Id. 513.

6. How. Stat. § 6702, providing for a decree for the payment by a mortgagor of a deficiency on a foreclosure sale, covers no case where a single decree cannot be made in favor of the complainant. It does not contemplate the case where there are several complainants, who hold the mortgage *jointly*, but have no general right to any of the debts secured.

[1] See *Shelden v. Warner Estate*, 59 Mich. 444; *Vaughan v. Black*, 63 Id. 215; *Shields v. Riopelle*, Id. 458.

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7. A statute which transfers to a court of equity jurisdiction to give judgments belonging to the common law cannot be enlarged by construction.

8. The omission of the dates of filing papers from the record is censured as creating trouble in the examination of causes.

Appeal from Sanilac. (Moore, J., presiding.) Argued November 5, 1889. Decided December 28, 1889.

Bill to foreclose a mortgage. Complainants Allan Shelden & Co., and defendants Montague and Wheat, appeal from the decree of foreclosure as entered in the lower court. Decree modified and affirmed. The facts are stated in the opinion.

John Divine (*E. F. Bacon,* of counsel), for complainants Allan Shelden & Co., Taylor, Rodgers & Co., Theo. H. Eaton & Son, and R. W. King & Co.

John Divine (*S. W. Vance,* of counsel), for complainant S. L. Boyce.

M. N. Mugan, for complainant Mayer Wile.

Byron R. Erskine (*O. C. Lungerhausen,* of counsel), for defendants James Erskine and Edward Erskine.

Fred S. Wheat, for defendants Fred S. Wheat and Chas. Montague.

Henry A. Harmon, for defendant Thos. A. Parker, and of counsel for complainants Allan Shelden & Co.

Elliott G. Stevenson and *Charles S. McDonald,* for defendants Edson, Moore & Co.

Cahill & Ostrander, for defendants Judson, Wiley & Judson.

P. H. Phillips, for defendants William E. Stewart, Charles F. Stewart, and Nellie E. Crane.

CAMPBELL, J. This foreclosure suit was brought to

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obtain a foreclosure and sale of a mortgage given by defendants Erskine and their wives in favor of a large list of creditors. The mortgage was dated April 1, 1876, and made to all the secured creditors directly. It was conditioned to pay the sum of $31,617, in specified sums, to each separate creditor, in three installments, at 1 year, 18 months, and 2 years, respectively, with 10 per cent. interest. It contained the usual power of sale, and in no way differed from ordinary individual mortgages.

By an omission which we have had reason to censure several times, and which frequently creates trouble in the examination of causes, the dates of filing papers, which are always indorsed, are omitted in the printing, and in some instances we have nothing from which we can get at them.

As the subpœna was issued November 12, 1887, we shall assume the bill was not filed till that day, which was about nine years and a half from the maturity of the secured debts. The mortgage contained no personal covenants, and by its terms the debts were payable severally. Some parties appeared, and the rest were brought in by service or publication, in the usual way. Some answered, and some did not.

Upon proofs put in, complainants Allan Shelden & Co. proved a debt larger than what was stated in the mortgage, and that it had been renewed by note within the limitation period. Other creditors and their assignees proved what was due them. The court gave a decree fixing the amounts due complainants, and other creditors brought in, within the exact limits mentioned in the mortgage, and no more. The decree ordered a sale in the usual way, but omitted any personal decree, and ordered the proceeds of sale to be held in court until proofs should be taken concerning the interests of other

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parties, and ordered notice of the hearing of such claims to be given by the commissioner.

Allan Shelden & Co. appealed, but no other creditors. Montague and Wheat appealed from so much of the decree as gave relief to any of the creditors, excepting five firms, who were given $35,005.05. The only tangible ground relied on by defendants Wheat and Montague is that there is no proof that the mortgage was accepted by any but the five firms named in the claim of appeal, and they claim a mortgage must be accepted as well as delivered.

While it is true that delivery and acceptance may be proper elements to be considered, it is also true that, where a mortgage has been delivered to become operative, a separate delivery is not necessary to every one named in it, but delivery to one is delivery to all, unless there is some reason to the contrary. This mortgage imposed no burden on the mortgages, and was entirely for their advantage. None of them ever repudiated it, and every one to whose attention it was brought directly or indirectly approved it. We do not see any defect in the proof of debts, and the form of appeal would not suggest any objection that did not cover all the excepted creditors alike. The want of acceptance is the point most distinctly pressed in the original brief, and we do not think it is well taken.

It may also be remarked that the only proof of Wheat's interest is an admission that he holds the equity of redemption in certain lands, which would indicate that the entire mortgage was to be preferred to his claim. But we do not decide upon this, as there is no doubt that the creditors named in the decree are secured by the mortgage.

So far as Montague is concerned, instead of putting in a sworn disclaimer, he put in an answer which, while set-

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ting up no specific claim of his own, denies complainants' right to relief against him, and avers himself to be a stranger to the issue. It appeared on the hearing that he had taken some part in getting Wheat's title, and it does not appear that he was not a proper defendant on that account. No decree was made against him for costs, and he did not take proper measures to be dismissed from the case. He appealed jointly with Wheat, and based his appeal on the merits, and not on his title to costs. He has seen fit to place himself on the footing of an ordinary party.

Shelden & Co.'s appeal covers, as urged in this Court, three grounds. One is that the allowance to them is too small. A second is that they should have had a personal decree. A third is that the commissioner should not have been directed to postpone the distribution.

Upon the last point, we think, the objection is well taken. There is no practice which authorizes parties to come in and prove their cases, except in the regular course of the cause. A practice has sometimes been followed—how regularly we do not now inquire—of advertising, under receiverships and other cases of administration of funds, for persons to come in and prove their claims. But in the present case the mortgage is for definite parties, and the time for them to come in was before hearing, so that any inquiry needed might be made in due time, by the ordinary examination and cross-examination of witnesses. There is nothing in any issue raised that would raise any question of parties. Upon the face of this record, we think, the decree was proper in the specific findings, and the sale should be made accordingly.

The claim that the mortgage secured Shelden & Co. any more than the sum mentioned in the mortgage is not tenable. The mortgage is for one round sum named, divided up in specific items, precisely making it up. It

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does not purport to secure the payment of any of these sums according to the existing terms and conditions, but it created in every case a new principal, payable in three semi-annual installments, with 10 per cent. interest. It is not likely that any of the creditors held claims which they could have sued at law as payable in such proportions, or at such times, or on such terms; but the condition of the mortgage was fixed and definite to pay the sums named in the manner named, and nothing else. And, as there was no covenant, it created no debt that could be sued at law.

The absence of a decree for personal liability in the original decree could be no ground of appeal, unless the decree went further, and declared none should exist. The provision authorizing the enforcement of payment for any deficiency is statutory, and cannot be enlarged. By section 6702 of Howell's Statutes it is provided that—

"On the coming in of the report of sale the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied, after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law."

But by the previous section (5656) it was provided that when the mortgage contains no covenant of payment the mortgagee's remedy must be confined to the land, where no—

"Bond or other separate instrument to secure such payment shall have been given."

The jurisdiction is therefore limited to cases where the mortgage is given to secure a written obligation, which must itself be capable of legal enforcement, and also not outlawed. *Michigan Ins. Co. v. Brown,* 11 Mich. 265. And it is also to be exercised, and the trial of liability had, on a new hearing, after the deficiency is reported. Any decree in advance of sale made for payment is, at

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best, no more than declaratory, and can fix no rights. See, further, on the whole subject, *Johnson v. Shepard*, 35 Mich. 115; *Howe v. Lemon*, 37 Id. 164; *Gies v. Green*, 42 Id. 107 (3 N. W. Rep. 283); *Mickle v. Maxfield*, Id. 304 (3 N. W. Rep. 961); *McCrickett v. Wilson*, 50 Id. 513 (15 N. W. Rep. 885); *Ransom v. Sutherland*, 46 Id. 489 (9 N. W. Rep. 530).

But, inasmuch as the question of the premature application for the decree was not much considered on the argument, and it may save further complications, we shall dispose of that matter now. It would be a sufficient answer to the application, that the mortgage does not purport to secure any written promise, and its terms do not correspond to any. But there is the further fatal objection that the statute covers no case where a single decree could not be made in favor of the complainant. It does not contemplate the case where there are several complainants, who hold the mortgage jointly, but have no general right to any of the debts secured. Certainly, there could be no joint suit at law in such a case. The decree for deficiency must be in favor of the complainant, but there is no provision for separate personal decrees in favor of separate complainants. There is no obstacle to a suit at law for a deficiency, and great practical difficulty would attend the trial of 15 or 20 separate proceedings in chancery for that purpose, especially if the first decree should sweep the defendants' property on execution before the rest had their turn. But the reasons are not material, if there is no law providing for the specific remedy. A statute which transfers to a court of equity jurisdiction to give judgments belonging to the common law cannot be enlarged by construction.

The only error we find in the decree is its failure to require the debts to be paid at once, out of the proceeds of sale, without further inquiry. It will be affirmed,

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with that exception. As all of the appellants prevail on this point, and none of them on any other, and none of the complainants or defendants have opposed this change, we think the decree of this Court should carry no costs on either side. The decree will be affirmed as modified, and the record remanded for further proceedings. The sale may be made without further delay than is necessary to give the proper notices.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

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THE PEOPLE, EX REL. LUTHER F. CONRAD, v. JEROME B. STONE.

Elections—Ballots—Plurality of votes—School examiner—Board of school inspectors.

1. In this country it is generally understood that, in the absence of any statutory provision expressly requiring more, a plurality of the votes cast will elect.
2. When the law requires certain officers to be elected by ballot, there is and can be no such thing as an "informal" ballot.
3. All ballots cast under statutory requirements are formal and final, if there is an election, and cannot be repeated.[1]
4. On the election of a school examiner by the board of school inspectors, the result of the ballot expresses that fact, and there is no necessity of declaring him elected.
5. It is only *elected* officers who hold until their successors are elected and qualified.
6. A school examiner *appointed* to fill a vacancy can only serve out the unexpired term.

Error to Clinton. (Smith, J.) Argued November 5, 1889. Decided December 28, 1889.

[1] See *School-dist. v. Root*, 61 Mich. 374.

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Information in the nature of a *quo warranto* to test the legality of respondent's claimed election as a member of the board of school examiners. Respondent brings error. Judgment of ouster reversed. The facts are stated in the opinion.

Auten & Moss and *O. L. Spaulding,* for respondent.

Charles M. Merrill, Prosecuting Attorney (*H. E. Walbridge* and *Will H. Brunson,* of counsel), for the people.

CHAMPLIN, J. By section 1, chap. 12, Act No. 266, Laws of 1887, the chairmen of the boards of school inspectors of the several townships in each county are required to meet at the office of the county clerk of their county on the first Tuesday in August in each year, and elect by ballot one school examiner, who shall hold his office for two years, or until his successor shall have been duly elected and qualified.

Section 12 of the same chapter provides:

"Whenever, by death, resignation, removal, or otherwise, a vacancy shall occur in the board of school examiners of any county, other than in the office of secretary, the judge of probate of such county shall have power to fill such vacancy until the first Tuesday in August after his appointment, at which time an examiner shall be elected to fill the unexpired term by the chairmen of the boards of the school inspectors of the several townships in the county."

Under the statute in force previous to 1887 there was one school examiner elected on the first Tuesday of August, to hold his term for three years, or until his successor was duly elected and qualified; and, in case of vacancy in the board of school examiners, the judge of probate was authorized to fill such vacancy for the unexpired portion of the term.

In 1887 there were three examiners,—one whose term of office would expire on the first Tuesday of August,

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1887; one on the first Tuesday of August, 1888; and one on the first Tuesday of August, 1889. The act of 1887 declared that no election for school examiner should be had in 1887, but the two examiners previously elected, whose term of office shall not have expired, should hold for the unexpired portions of the terms for which they were elected.

It appears that one S. W. Baker was one of the school examiners elected in 1885, and whose term of office would expire on the first Tuesday of August, 1888, and that he resigned his office; and Luther F. Conrad was appointed by the judge of probate to serve as school examiner for the unexpired portion of such term. It further appears that the chairmen of the several boards of school inspectors of the respective townships in Clinton county convened at the office of the county clerk of that county on the first Tuesday of August, 1888, and were called to order by the clerk, and 16 members were present, and answered to their names, and, on motion, H. U. Webb was chosen chairman of the meeting; that a motion was made, and the board proceeded to an informal ballot to elect a school examiner. Tellers were appointed, and the ballot resulted as follows: J. B. Stone received 8 votes; L. F. Conrad received 7 votes; E. M. Plunkett received 1 vote. Five more informal ballots were taken, with the same result. The record of the board proceeds to state:

"On motion of Mr. Hoffman, the board adjourned. The meeting was again called to order by the clerk, and the following members answered to their names."

The names are given, fourteen in all. The record, as made by the clerk, then proceeds:

"On motion of Mr. Winston, H. U. Webb was chosen as chairman of the meeting. On motion of Mr. Taylor, the chair appointed as tellers Messrs. Taylor and Hoffman. On motion of Mr. Taylor, the board proceeded by

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ballot to elect a school examiner. The whole number of votes cast was fourteen (14). J. B. Stone received eight (8); L. F. Conrad received five (5); E. M. Plunkett received one (1),—total, 14. Mr. Stone, having received a majority of all the votes cast, was declared duly elected. On motion of Mr. Taylor, the board adjourned."

Mr. Stone was verbally notified of his election, took the oath of office, and entered upon the duties of school examiner.

L. F. Conrad, conceiving that the election was illegal, and that in fact no election had been had, claimed that no successor had been elected, and that he, by virtue of his appointment, in 1885, was entitled to hold the office until his successor had been duly elected and qualified, namely, until the first Tuesday of August, 1890, and caused an information in the nature of a *quo warranto* to be filed in the circuit court for the county of Clinton against said Jerome B. Stone, alleging that Stone intruded into and usurped the office of school examiner, and that he (said Conrad) was lawfully entitled to the possession of the office. Plea was filed setting up that the respondent, Jerome B. Stone, was duly elected by the board of school examiners on August 7, 1888, and that he had duly qualified as such. Replication that he was not legally elected, and that no legal election was held. On the trial before the circuit judge, without a jury, in addition to the above facts, it was shown that two of the members of the board, after the first adjournment, left for home, and were not notified of the calling together of any other meeting that same day, or any other time, and knew nothing about it until after the meeting.

The circuit judge found that said Jerome B. Stone did unlawfully usurp, intrude into, and unlawfully held, the office of school examiner, and gave judgment of ouster,

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and further adjudged that the relator, Luther F. Conrad, was still the legally and lawfully elected and appointed school examiner, and entitled to hold said office until his successor should be elected and qualified.

In reviewing these proceedings, it is proper to remark, in the first place, that the statute requiring the board of school inspectors to elect school examiners by ballot does not require that a majority of the whole board, nor that a majority of the votes cast, shall be necessary to elect. In this country it is generally understood that, in the absence of any statutory provision expressly requiring more, a plurality of the votes cast will elect. It is only in cases when the statute so provides that a majority of all the votes cast is necessary to the choice of an officer. McCrary, Elec. § 197; Cush. Leg. Ass. § 118; Paine, Elec. § 571; Cooley, Const. Lim. 619. Mr. Cushing says:

"In elections in which the principle of plurality is adopted, the candidate who has the highest number of votes is elected, although he may have received but a small part of the whole."

In general elections in this State we have adopted, and constantly act upon, the principle that plurality elects (How. Stat. § 143); and whenever, as, in some cases, in the board of supervisors and some municipal charters, a majority of the body voting is required, it is especially stated in the law.

It follows that Jerome B. Stone was elected upon the first ballot taken, when the whole of the members of the board were present. The law has provided for an election in case of a tie. Section 1 of chapter 12 enacts that—

"The county clerk shall be the clerk of such elections in all cases, and, in case of a tie, shall give the casting vote."

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In this case the ballots were cast in such manner as to prevent a tie, but not to prevent an election.

Counsel for relator claims that there was no significance in, and there could be no election upon, an "informal ballot." We cannot accede to such claim. When the law requires certain officers to be elected by ballot, there is and can be no such thing as an "informal ballot." All ballots cast under statutory requirements are formal and final, if there is an election, and cannot be repeated. "Informal ballots" are sometimes taken in a caucus or in a nominating convention; but they have no place in an election required by law for the election of officers. Neither was it necessary that Mr. Stone should have been declared elected. The result of the ballot expressed that fact, and it was the duty of the clerk to notify him of his election.

But, had there been no election, the relator was not entitled to the office. It is only *elected* officers who hold until their successors are elected and qualified. Mr. Conrad was appointed to fill a vacancy, and he could only serve out the unexpired term. Had there been no election by the board, as claimed by relator, there would have been a vacancy in the office which the judge of probate could have filled by appointment until the first Tuesday of August after the appointment.

The judgment of the circuit court must be reversed, with costs of both courts against relator, and the incumbent, Jerome B. Stone, is confirmed in his office of school examiner.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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THE TOWNSHIP OF LEBANON v. ALTIE C. BURCH.

Highways—Encroachments—Equity jurisdiction.

1. Chapter 6 of Act No. 243, Laws of 1881 (How. Stat. §§ 1373–1376), furnishes not only an adequate remedy at law for the removal of encroachments upon *township* highways, but one devised for the very purpose, and made obligatory in terms, and leaves no occasion for resort to equity, unless under some possibly peculiar circumstances which cannot generally exist.

2. The following general propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—The highway law now in force was passed in 1881, and supplied methods for dealing with encroachments which had been previously wanting or were very imperfect. The former laws made no provision for dealing with encroachments except where the highway had been duly laid out according to law. Highways by user, or those in any way lacking complete regularity, were left without statutory redress. *Parker v. People*, 22 Mich. 93; *Roberts v. Commissioners*, 25 Id. 23.

b—The proceedings in case of regularly laid out highways consisted of a species of inquest not in the ordinary course of law; and it was held by this Court that titles and boundaries actually disputed could not be subjected to any remedy which would deprive a party of his right to a trial after the course of the common law. *Sheldon v. Kalamazoo*, 24 Mich. 383; *Roberts v. Commissioners*, 25 Id. 23; *Campau v. Button*, 33 Id. 525; *Gregory v. Stanton*, 40 Id. 271; *Willson v. Gifford*, 42 Id. 454.

c—The amendment to Comp. Laws 1871, section 5057 (How. Stat. § 6611), empowering courts in chancery to hear and determine all cases of encroachments upon the public highways, streets, and public alleys in organized townships and incorporated villages and cities, being merely an amendment of a general section in the chapter on courts of chancery, left the section, as before, to be construed with the rest of the statute, and subject to its provisions, as far as practicable.

d—How. Stat. § 1371, authorizes the highway commissioner, in case of encroachment upon a township highway, to order its removal, which order must specify the width of the road, the greatest extent of the encroachment, and of what it con-

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sists, and the place or places encroached upon, with reasonable certainty; and until notice of removal is served upon the landholder he cannot be regarded as in fault, nor can he be called upon to remove anything not distinctly located by the notice; and, in cases of dispute as to existence and bounds of the highway, this summary remedy is forbidden, and the commissioner is specifically directed to proceed at law by trespass. How. Stat. § 1372; *People v. Smith*, 42 Mich. 138; *Gregory v. Knight*, 50 Id. 61; *LeBlanc v. Kruger*, 75 Id. 561.

e—Under the highway law no township officer except the commissioner of highways has any right to meddle with highway matters. His duty is, when he thinks a road is encroached on, to satisfy himself in some responsible way, which will bear the test of a lawsuit, *where* the highway lines are, and *how* they are encroached upon. Until he complains, no one else can do so, and no one else can change his order; and when his order is disregarded, his remedy is specifically prescribed, and no remedy in any other form is as well calculated to reach the desired result.

f—A bill cannot be filed to take into a court of chancery jurisdiction over a controversy of a legal nature without a verification of such facts as show its propriety. *Moore v. Cheeseman*, 23 Mich. 332.[1]

Appeal from Clinton. (Smith, J.) Argued November 5 and 6, 1889. Decided December 28, 1889.

Bill to remove encroachment from highway. Defendant appeals. Decree reversed, and bill dismissed. The facts are stated in the opinion.

Auten & Moss, for complainant.

Will H. Brunson (*Spaulding & Walbridge*, of counsel), for defendant.

[The points of counsel are stated in the opinion.—REPORTER.]

CAMPBELL, J. A bill in equity was filed in the circuit court for the county of Clinton to remove a fence alleged to be an encroachment on a highway. The court

[1] See *Bernier v. Bernier*, 72 Mich. 43 (head-note 2).

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granted a decree varying in extent from the case made by the bill. Defendant appeals, claiming that the suit was not maintainable in equity on the record, and that the decree was not correct on any ground.

The bill set up the ownership by defendant and by her grantors of the E. ½ of the N. E. ¼ of section 17, in town 8 N., of range 4 W.; that as early as 1855 a four-rod wide highway was laid east and west, taking two rods in width of the north end of the lot, and was kept in use, of full width, for over 20 years, till 1883 or 1884, when defendant and Loren G. Burch, whose interest she now holds, built a rail-fence 80 rods long, including from 18 to 21 feet of the width of the highway, and only from 12 to 16 feet from the legal center of the highway; that defendant still maintains the encroachment, and refuses to remove it, claiming it is rightful, and no encroachment.

This is the whole substance of the bill, except its prayer. It is not signed by the highway commissioner, or by any township officer, and is not verified.

Defendant, saving all exceptions to the bill, admits that a highway was laid across the north end of the premises, including two rods of the land, and that Loren G. Burch built the fence now standing, which is a board-fence, in place of an old rail-fence previously there, and says the fence does not encroach on the two rods in question, but is on her own land, and fully two rods south of the section line. Upon the testimony in the case, the only surveys which seem to have paid any close attention to the government field-notes agree in fixing the section corner where the line would leave the road center far enough from defendant's fence to make it no encroachment. The survey in 1880 was made with the concurrence and under the oversight of the town commissioner of highways, who recognized its correctness,

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and found that the encroachments were on the other side of the road. In our opinion, the testimony concerning the correct location is clearly in defendant's favor, and the decree should be reversed and the bill dismissed on the merits.

But the case calls properly for remark on its methods. The highway law now in force was passed in 1881, and supplied methods for dealing with encroachments which had been previously wanting or very imperfect. The former laws made no provision for dealing with encroachments except where the highway had been duly laid out according to law. Highways by user, or highways in any way lacking complete regularity, were left without statutory redress for encroachments. See *Parker v. People*, 22 Mich. 93; *Roberts v. Commissioners*, 25 Id. 23.

The proceedings in case of regularly laid out highways consisted of a species of inquest not in the ordinary course of law; and it was held by this Court that titles and boundaries actually disputed could not be subjected to any remedy which would deprive a party of his right to a trial after the course of the common law. *Sheldon v. Kalamazoo*, 24 Mich. 383; *Roberts v. Commissioners*, 25 Id. 23; *Campau v. Button*, 33 Id. 525; *Gregory v. Stanton*, 40 Id. 271; *Willson v. Gifford*, 42 Id. 454 (4 N. W. Rep. 170).

The result was, that although when there was no honest dispute about the highway or its lines the commissioner could by inquest be authorized to remove encroachments, yet where there was any dispute he could not do so until the right had been legally settled, while in highways by user he could not interfere at all. This showed the necessity of equitable interference in the absence of any adequate legal remedy, and especially where, after the right was settled, no specific remedy existed for removing the nuisance.

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After the law had been found so imperfect by this Court, an amendment was made in 1877 to section 5057 of the compilation of 1871, now numbered 6611 of Howell, which conferred on courts in chancery the same jurisdiction existing in England, whereby such courts were further empowered—

"To hear and determine all cases of encroachments upon the public highways, streets, and public alleys in organized townships, incorporated villages and cities, in this State. Such suits may be instituted in the corporate name of such townships, villages, and cities."

This, being merely an amendment of a general section in the chapter on courts of chancery, left the section, as before, to be construed with the rest of the statute, and subject to its provisions, as far as practicable.

The law so stood until the highway act of 1881 was passed, which did not affect cities and villages, but provided very fully for highways in townships, and gave adequate remedies where none existed before. By chapter 6, including sections 1371 to 1378 of Howell, the subject of encroachments and obstructions is systematically dealt with. By section 1371 the commissioner, in case of encroachment, is authorized to order its removal, but it is declared that—

"Every such order shall specify the width of the road, the greatest extent of the encroachment, and of what it consists, and the place or places in which the same may be, with reasonable certainty."

Exceptions are made in favor of fences protecting hedges and improvements. Until such notice is given we have held that the land-holder cannot be regarded as in fault, and that he cannot be called on to remove anything not distinctly located by the notice. *People v. Smith*, 42 Mich. 138 (3 N. W. Rep. 302); *Gregory v. Knight*, 50 Id. 61 (14 N. W. Rep. 700). In the latter

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case it was pointed out that in cases of dispute the summary remedy was directly forbidden, and the commissioner is specifically directed to proceed at law by trespass. Section 1372.

By sections 1373 to 1376 full directions are given concerning this action. It is to be begun by the commissioner in his name of office, before a justice, in the form of trespass, and, in case the jury find the defendant guilty, they must also find the extent of the encroachment, and whether the highway is by user or otherwise. Either party may appeal to the circuit, and, in case of final judgment in favor of the commissioner, he is thereby authorized to remove the encroachment summarily.

This furnishes complete and specific relief, in connection with trial by jury, to which the land-owner is constitutionally entitled, and leaves no occasion for resort to equity, unless under some possibly peculiar circumstances which cannot generally exist. As this chapter only applies to country roads in townships, it would not have any bearing on the form of remedy in cities and villages, which are also covered by the equitable amendment of 1877.

We held under this statute in *LeBlanc v. Kruger*, 75 Mich. 561 (42 N. W. Rep. 980), that the order and notice of removal must be substantially accurate, and that the declaration must strictly follow the order for the failure to conform to which the action was brought, and on the correctness of which the jury must pass. As there stated:

> "The principal object of the proceeding is to obtain a finding of record which shall settle the condition and extent of the road and of the encroachment, and the order is the foundation of the suit."

Under the highway law no township officer except the commissioner has any right to meddle with highway

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matters. His duty is, when he thinks a road is encroached on, to satisfy himself in some responsible way, which will bear the test of a lawsuit, where the highway lines are, and how they are encroached upon. Until he complains, no one else can do so, and no one else can change his order. When his order is disregarded his remedy is specifically prescribed, and no remedy in any other form is as well calculated to reach the desired result.

The bill and proceedings in the present case are entirely repugnant to the rules which have always been observed in regard to jurisdiction and procedure. In the first place, there is not only an adequate remedy at law, but one devised for the very purpose, and made obligatory in terms, and better adapted to do justice.

In the second place, neither bill nor proof indicate that the highway commissioner ever determined that there was any encroachment or gave any order of removal. Neither does it appear that this suit was authorized by him. And in this connection it should be noted that, by the settled practice in England and here, a bill cannot be filed to take into a court of chancery jurisdiction over a controversy of a legal nature without a verification of such facts as show its propriety. *Moore v. Cheeseman*, 23 Mich. 332. This bill is not sworn to, and it shows no reason for resorting to equity instead of law. Had it been sworn to, it must have been, under the circumstances, by the highway commissioner, as the officer having official notice of the facts. Now there is nothing in pleadings or proofs to show who, if any, among the township authorities, directed it to be filed.

The case, therefore, is not a proper one for such proceedings as were had here.

In the third place, the bill contains no accurate description of any encroachment, and the decree does not conform to the allegations. As we have already intimated,

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it is not sustained by the proofs, and, furthermore, we have no information what the commissioner thought in the matter, beyond the inference that, if he had thought any encroachment existed, he would probably have done his duty under the statute.

The decree should be reversed, and the bill dismissed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

DEVERUX BARRETT v. GEORGE ROWE.

Replevin—Impounded animals—Sale.

1. Under a village ordinance requiring the pound-master to sell at public auction animals which have been impounded for a period of eight days, and are unclaimed, and to give six days' notice of such sale, a sale cannot be made until the eight days have expired, and not then until the notice provided for is given, which notice is a part of the proceedings to sale, and cannot be given until the expiration of the eight days of impounding, the object being to give the owner fourteen days in which to redeem his property before its sale.
2. Chapter 289, How. Stat. (How. Stat. §§ 8372–8374), providing for a special action of replevin in the case of impounded animals, is confined to cases arising under its provisions.

Error to Cheboygan. (Ramsdell, J.) Argued November 6, 1889. Decided December 28, 1889.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

George W. Bell, for appellant.

Watts S. Humphrey, for plaintiff.

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SHERWOOD, C. J. This action is replevin for a cow, and was tried in the Cheboygan circuit before the court without a jury, and judgment was given for the plaintiff. Defendant brings error. The facts in the case are all conceded, and are as follows:

"That the cow in question was impounded on the night of August 30; that notice of sale was posted on September 1; that the sale took place on September 8. Plaintiff replevied the cow, claiming that the sale was illegal, and did not divest him of the title to the animal. Plaintiff raises no question regarding the validity of the village ordinance; admitting that, if their proceedings leading up to the sale were proper, they had a right to go on and make the sale. But said plaintiff claims that the proceedings leading up to the sale were illegal and unauthorized, in this: That the village ordinance of Mackinaw City provided as follows:

'"SEC. 9. The pound-master shall (at the public pound) sell at public auction any animal which has been impounded therein for a period of eight days, and is unclaimed, or whose owner refuses to pay the fees hereinbefore provided. Notice of such sale shall be given at least six days prior thereto, and shall contain a description, as near as may be, of the animal to be sold, and shall be posted in conspicuous position in the three following places, to wit: At the post-office, at the south-east corner of lot twenty in block number sixty-three, and at the pound where such sale is to be held,' etc.

"The plaintiff's position is that no legal notice of sale can be posted, and no proceedings taken leading up to the sale, till that eight days have expired. Defendant, however, claims, even if that were so, that then, under the statute, plaintiff had no right to replevin the animal in that way; that said plaintiff ought to have proceeded under the statute relative to distraining cattle. It is also conceded by plaintiff that he knew of the fact of said cow being impounded, but that at the time of sale he forbade the same. It is also conceded that the value of the cow was the sum of fifty dollars."

The position of counsel for plaintiff is correct. The sale provided for under the ordinance of the village of Mackinaw City could not be made until eight days after

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the animal is impounded, and not then until six days' previous notice of the same had been given. The notice is a part of the proceedings to sale, and cannot be taken until after the eight days of impounding have expired under the ordinance. It was evidently intended to give the owner an opportunity for fourteen days to redeem his property before making sale thereof. The sale was premature.

The plaintiff had the right to bring the action he did to recover his property. That provided for under chapter 289, How. Stat. §§ 8372–8374, applies to cases arising under the provisions of that chapter, and is confined thereto.

The judgment at the circuit must be affirmed.

The other Justices concurred.

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THE DETROIT FREE PRESS COMPANY v. ALBERT W. BAGG.

Commencement of suit—Statute of limitations—Affidavit of personal service—Evidence.

1. A suit commenced by declaration, under How. Stat. § 7291, cannot be considered as *duly commenced* until a copy of the declaration with notice of the rule to plead is personally served upon the defendant.

2. The affidavit of a private person, showing personal service of a declaration as commencement of suit, is open to contradiction by the defendant, who may show that no such service was made.

Error to Wayne. (Hosmer, J.) Argued November 6, 1889. Decided December 28, 1889.

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Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Edward A. Gott, for appellant.

Edward E. Kane, for plaintiff.

MORSE, J. This action was commenced in the circuit court for the county of Wayne on November 30, 1886, by filing a declaration on the common counts in *assumpsit.* January 5, 1887, a bill of particulars was filed of various items claimed by plaintiff, commencing of date January 29, 1873, and ending July 31, same year. The defendant pleaded the general issue, and gave notice of the statute of limitations as a defense.

Upon the trial it was admitted that the merchandise set forth in plaintiff's bill of particulars was had by the defendant at the dates thereof, and was worth the several amounts charged therefor, and that the same, with interest, amounted to $416.53. The plaintiff also introduced evidence tending to show that defendant had promised to pay for the goods, but such promises were made before February 9, 1878. When the debt was contracted the defendant was a minor. He became of age May 11, 1874, between which time and February 9, 1878, the alleged promises to pay were made.

It was insisted by the defense that upon this showing the debt was outlawed at the time of the commencement of this suit. To rebut this claim the plaintiff introduced in evidence the files and records of the superior court of Detroit in the case of *The Detroit Free Press Company v. Albert W. Bagg.* From these it appeared that suit was brought for the value of the same goods mentioned in the bill of particulars in this case by filing of declaration, February 9, 1878. Such declaration showed upon its back, by the affidavit of John C. Mundy, ser-

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vice, upon February 11, 1878, on said Albert W. Bagg, of the declaration and rule to plead. The defendant was defaulted, and judgment entered against him in said cause, September 24, 1880, for the sum of $357 damages, and $22.25 costs of suit. July 1, 1886, Bagg moved to set aside this judgment on the following grounds:

"1. That suit was begun by a declaration in which there was no allegation of the residence of either party to the suit in the city of Detroit, or elsewhere, nor any averment showing any jurisdiction over the person of either party, and therefore the court had no jurisdiction to render the judgment.

"2. Defendant was never served with a copy of the *narr.*, or copy of the rule to plead; and the defendant never appeared in said action, and did not reside in Detroit.

"3. Substitution of Mr. Kane in place of Mr. Hibbard as plaintiff's attorney, without notice to defendant, and judgment on default taken by such substituted attorney."

In support of this motion, defendant filed an affidavit wherein, among other things, he averred the facts set up as the ground of the motion. The motion was denied by the superior court, and subsequently, November 10, 1886, on *mandamus*, the Supreme Court directed the judge of the superior court to vacate and set aside the judgment. No opinion was filed in the case; but the Chief Justice, in reply to an inquiry of plaintiff's counsel, wrote:

"In *Bagg's Case*, we ordered the *mandamus* on the ground that Mr. Bagg's affidavit was not answered, and made out a sufficient case."

Defendant testified that he had never promised to pay the debt since he became of age. The circuit judge submitted the case to the jury upon the single question whether the defendant, since arriving at his majority, had promised to pay the debt, and thus ratified it. The jury found for the plaintiff in the sum of $416.53. Judgment was entered accordingly.

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The only point in issue here is whether this case falls within the provisions of section 8723, How. Stat. The debt was outlawed at the time of the commencement of this suit, unless this statute saves it. This statute provides that, in the case of an action duly commenced within the time limited by the statutes of limitation, if the writ or declaration shall fail of a sufficient service or return, by any unavoidable accident, or by any fault or neglect of the officer to whom it is committed, or if the writ be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein.

The counsel for the defendant contends, first, that the suit was never "duly commenced" in the superior court, for the reason that there was never any personal service on the defendant of a copy of the declaration and rule to plead. The return of personal service not being made by an officer, but by a private person, his affidavit of such service is open to contradiction by the defendant, and he is at liberty to show that no such service was made upon him.

The question then arises, when is a suit commenced by declaration? Is the filing and entering of a rule to plead a commencement of the suit, or must there also be a service of the same before the suit is duly commenced? The statute authorizing the commencement of suits by declaration reads as follows:

"Actions brought for the recovery of any debt, or for damages only, may be commenced either—

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"1. By original writ, or

"2. By filing in the office of one of the clerks of the court a declaration, entering a rule in the minutes kept by such clerk requiring the defendant to plead to such declaration within twenty days after service of a copy thereof and notice of such rule, and *serving* a copy of such declaration and notice of such rule personally on the defendant." How. Stat. § 7291.

Under this statute, we are all agreed that the contention of defendant is correct, and that service must be had personally before the suit can be considered as "duly commenced." As there was no serious contention that there was ever any such service upon Bagg, the circuit judge should have directed a verdict for the defendant. There is no necessity of examining any other questions in the case.

The judgment is reversed and a new trial granted, with costs of both courts to defendant.

The other Justices concurred.

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HERBERT C. BALCH, ADMINISTRATOR, v. THE GRAND RAPIDS & INDIANA RAILROAD COMPANY.

[See 67 Mich. 394.]

Practice in circuit courts—Special questions to jury—Verdict—Province of jury.

1. Requests for findings by the jury which do not call for their conclusions on any fact in issue, but only on the truthfulness or accuracy of certain named witnesses on certain facts which were matters of evidence merely, however significant they may have seemed, are very objectionable.[1]

[1] See *Transportation Co. v. McMorran*, 73 Mich. 467 (head-note 3).

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2. It is going too far to ask for the reversal of a judgment, on error, on the idea that the jury were bound to disbelieve sworn testimony because other testimony was more probable.
3. Where a verdict is supported by testimony which was legally receivable, and which the jury had a right to believe and did believe, and which the trial court fairly submitted to them, it is no part of the duty of the appellate court to speculate whether the jury acted judiciously in determining which witnesses presented matters truly and which otherwise. In such a case they act within their legitimate powers, and, in legal presumption, decide correctly.
4. A verdict considerably lower than the outside range of the testimony would have warranted is not excessive.

Error to Osceola. (Judkins, J.) Argued November 6, 1889. Decided December 28, 1889.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

T. J. O'Brien and *J. H. Campbell,* for appellant.

Pratt & Davis, for plaintiff.

CAMPBELL, J. Plaintiff's intestate was killed at Cadillac, in Wexford county, on March 18, 1886, by defendant's locomotive and tender.

In the early evening of that day the locomotive and tender were backing up northward, towards Mason street, on defendant's main track, pushing a couple of cars in the same direction on a parallel track, west of the main track, by means of a push-pole running across from the rear end of the water-tank to the rear end of the hindermost of the two cars. The testimony showed that decedent was struck by the push-pole, and thrown under the tank-wheels, and run over, so that the upper part of his chest was crushed in so as to be partially severed internally, if not externally, from the rest of the body. As the case was submitted to the jury, the chief dispute was whether deceased was, when struck, on the sidewalk in

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Mason street, or some distance south of it, between defendant's tracks. The court below directed the jury that they could give no verdict for plaintiff unless, in addition to finding negligence in defendant, and freedom from contributory negligence in deceased, they found that the latter was in Mason street when struck. Several special findings were made by the jury, which defendant claims do not harmonize with the general verdict. The jury found a verdict of $2,000 for plaintiff.

Some minor points of error were presented on the argument; the chief contention, however, being that there was no case made for the plaintiff, by reason of the injury appearing to have been inflicted away from any part of Mason street. We do not think that the other questions present anything new or important, and they do not seem to us to require notice. If there was any case to go to the jury at all, the circuit judge was quite as liberal to the defendant, and quite as exacting of the plaintiff, as required by the most liberal rules of law applicable in such cases.

This case came up once before from Grand Traverse county, and is reported in 67 Mich. 394 (34 N. W. Rep. 884). It was the opinion of this Court on that occasion that the jury had made a mistake in estimating damages, and had given a verdict for a sum apparently $1,600 beyond what the correct calculation from the testimony would have made out. The verdict of $2,000 in the present case is considerably lower than the outside range of the testimony would have warranted, and is not excessive.

That was the only error which this Court on that occasion saw fit to pass on. If that record presented the questions now raised, it was not then deemed decisive. After a new trial had been had subsequent to the remanding of the cause, which was set aside for excessive dam-

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ages by the trial court, the venue was changed to Osceola county, where it is evident there could have been no disposition in the jury to multiply damages. The complaint made is that the testimony of locality was not such as to authorize the verdict.

It is not in our province to weigh the testimony, and we shall not attempt to do so. All that is necessary is to indicate some of the disputed points, as connected with those not disputed.

The body of deceased was removed from between the engine and tender wheels about the middle of Mason street, which is shown to be a street about 80 feet wide. There was testimony that some clothing which he had just got from the wash, and the satchels in which he carried books for sale, and scattered books, were found near him, and that blood in considerable quantities was also found near him.

Defendant introduced testimony of a search by some witnesses down the track south of the street, and their observation of appearances of blood, and of the dragging of a body from a point some distance south of the street, up towards the street, and also finding some books and articles there. The testimony for plaintiff contradicted these appearances, and indicated that the appearances of the traces of the accident, as well as the articles scattered, were all within Mason street.

There was positive testimony of witnesses who swore they saw the plaintiff struck down on the sidewalk, and some other testimony favoring that idea. There was also positive testimony put in by defendant to the contrary. The witnesses on both sides were rigidly cross-examined, and the circumstances claimed to indicate the intrinsic probability or improbability of their statements appear in the record.

The jury found, by their general verdict, that the

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injury was inflicted while plaintiff was in Mason street. Defendant proposed several special questions, as follows:

1. "Did the witnesses Cutler, Cook, Bragg, Johnson, and Haines, or any of them, make an examination of the railroad track, soon after the accident, to see where Mr. Balch was when first struck?" Answered: "Yes."

2. "Did they, or any of them, in making such examination, go on or near the main track, south of the south sidewalk of Mason-street crossing?" Answered: "Yes."

3. "Did they, or any of them, find any of the books or any of the clothing of Mr. Balch south of the south sidewalk of Mason street?" Answered: "No."

4. "Did they, or any of them, find evidence of the body having been dragged along the track south of the south sidewalk?" Answered: "No."

5. "Did they, or any of them, find fresh blood on the rail, or near it, south of the south sidewalk?" Answered: "Yes."

The circuit judge intimated his doubts whether these questions were of such a character as would determine any issuable facts conclusively, but allowed them to be submitted. The answers all favor plaintiff, except that it is claimed the last is inconsistent. But the record contains testimony tending to show that the bleeding body was carried where blood might have dripped on the rails where the jury say it was found, and finding it there was not conclusive.

The jury believed the testimony locating the injury and the finding of the articles of personal property in Mason street, and discredited the finding of these articles, or the infliction of the injury, elsewhere. We are asked to find, as a matter of law, that the jury had no right to find as they did.

The circuit judge gave the jury very careful instructions on every point in the case. Defendant was allowed to present requests for findings to the jury that were very objectionable, inasmuch as they did not call for the conclusions of the jury on any fact in issue, but only on

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the truthfulness or accuracy of certain named witnesses on certain facts which were matters of evidence merely, however significant they may have seemed. The jury, after all these precautions, rendered a verdict not excessive in amount, and necessarily deliberate.

We do not think the result justifies the bitterness of the censure cast on the jury and the circuit court in arguing for a reversal. It is going too far to ask us, on error, to reverse a judgment on the idea that the jury were bound to disbelieve sworn testimony because other testimony was more probable. The verdict is certainly supported by testimony which was legally receivable, and which the jury had a right to believe and did believe, and which the circuit judge very fairly submitted to them. It is no part of our duty to speculate whether they acted judiciously in determining which witnesses presented matters truly and which otherwise. They acted within their legitimate powers, and, in legal presumption, they decided correctly.

The judgment should be affirmed.

The other Justices concurred.

JOHN FINNEGAN v. THE DETROIT FREE PRESS COMPANY.

Libel and slander—Identity of person libeled—Pleading—Evidence.

1. In this case Mr. Justice MORSE filed an opinion, favoring a reversal for the failure of the trial court to instruct the jury, as requested by the defendant, that if the plaintiff, at and before the publication of the alleged libel, was generally known as "John D. Finnegan," and not as merely "John Finnegan," and that the initial letter had been adopted by him to distin-

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guish him from persons known by the latter name, the article complained of will not be presumed to have had reference to the plaintiff, and, as there is no evidence in the case that plaintiff is the person referred to in said article, their verdict must be for the defendant.

2. CHAMPLIN and LONG, JJ., concurred in the reversal of the judgment.

3. SHERWOOD, C. J., and CAMPBELL, J., favored the affirmance of the judgment.

Error to Wayne. (Brevoort, J.) Submitted on briefs November 6, 1889. Decided December 28, 1889.

Case. Defendant brings error. Reversed. The facts are stated in the opinion of SHERWOOD, C. J.

Black & Wilkins, for appellant, contended:

1. The publication complained of is not, as a matter of law, libelous on its face as regards plaintiff, because it does not name nor in any way identify or point towards the plaintiff, and it was not written or published concerning him.

2. When the libel does not, on its face, appear to relate to the plaintiff, it must be shown in what way it relates to him, notwithstanding the previous averment that it was published concerning him; citing *Clement v. Fisher,* 7 Barn. & C. 459; and where the plaintiff is not mentioned by name in the publication, such facts and circumstances should be alleged, by way of inducement, as to make it plain that he was the person intended; citing *Miller v. Maxwell,* 16 Wend. 9; *Lewis v. Soule,* 3 Mich. 514; and the innuendo, to wit, the allegation that defendant intended the plaintiff, cannot be made to perform the office of the inducement, and hence it is held that an innuendo cannot be proved; citing *Snell v. Snow,* 13 Metc. 278; *Carter v. Andrews,* 16 Pick. 1; *Gibson v. Williams,* 4 Wend. 320; *Van Vechten v. Hopkins,* 5 Johns. 226; *Hawkes v. Hawkey,* 8 East, 427; *Roberts v. Camden,* 9 Id. 93.

3. The principle in relation to defamatory words, as well as upon libels, is well settled, that the person slandered or libeled must be certain, and that if the words are uncertain, and do not designate any particular person, no averment shall make them actionable; citing Roll. Abr. 81, l. 25, 79; *Van Vechten v. Hopkins,* 5 Johns. 228; *People v. Cline,* 44 Mich. 290; and see, on the question of identity, *Jackson v. Christman,* 4 Wend. 277,

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284; 1 Greenl. Ev. § 493; Odgers, Lib. & Sland. 127–133, and cases cited.

4. If there are circumstances, aside from the use of the name "John Finnegan," which tend to show that the plaintiff is the person libeled, they must be proved, and to this end must be specially alleged in the declaration as matter of inducement; citing *Miller v. Maxwell*, 16 Wend. 9, 17, 18; *Lewis v. Soule*, 3 Mich. 514; *Weiss v. Whittemore*, 28 Id. 366, 371.

5. If the libel cannot, by any fair and reasonable intendment, from the language itself, be construed as reflecting upon the plaintiff, the court will not, in the absence of a *colloquium* pointing to its meaning, put a libelous construction upon it; citing *Capel v. Jones*, 4 C. B. 259; *Snell v. Snow*, 13 Metc. 278; and extrinsic matters cannot be introduced by an innuendo, but, when necessary, must be brought upon the record in the other way; citing *Roberts v. Camden*, 9 East, 93.

6. The article sued upon is not, upon its face, libelous, for it does not contain either the charge of larceny or of arrest for larceny, suggested by the plaintiff's innuendoes, and was not shown, and under the declaration could not be shown, to be libelous by proof of any extrinsic facts or circumstances, and it should not have been allowed to go to the jury.

7. An alleged libel, when relied upon as published, must be construed according to the plain and natural meaning of the language, which cannot be varied or extended by implication or by innuendo; citing *Lewis v. Soule*, 3 Mich. 514; *Weiss v. Whittemore*, 28 Id. 366; *Miller v. Maxwell*, 16 Wend. 9; *Taylor v. Kneeland*, 1 Doug. 67; *Snell v. Snow*, 13 Metc. 278; Townsh. Sland. & Lib. § 141; *Farnsworth v. Storrs*, 5 Cush. 412; *Purdy v. Printing Co.*, 96 N. Y. 372.

8. The principle here laid down as applicable to the identity of the person libeled applies with equal force to the effect and meaning of the alleged libelous matter; citing *Carter v. Andrews*, 16 Pick. 1; *Gibson v. Williams*, 4 Wend. 320; *Van Vechten v. Hopkins*, 5 Johns. 226; *Hawkes v. Hawkey*, 8 East, 427; *Roberts v. Camden*, 9 Id. 93.

9. To enable the plaintiff to introduce testimony tending to prove that the words used should be understood in a sense different from their natural meaning, there must be some prefatory allegation and explanation of such particular meaning of the words, and the *colloquium* should connect with this introductory matter the publication of the words complained of, leaving to the innuendo its proper office of giving to these words the construction claimed for them; citing *Adams v. Stone*, 131 Mass. 433; *McFadin v. David*, 78 Ind. 445; *Schurick v. Kollman*,

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50 Id. 336; *Hays v. Mitchell*, 7 Blackf. 117; *Taylor v. Kneeland*, 1 Doug. 67; *Clarke v. Fitch*, 41 Cal. 472; *Nichols v. Packard*, 16 Vt. 83; *Brown v. Brown*, 14 Me. 317; *Harris v. Burley*, 8 N. H. 256; *Jones v. Diver*, 22 Ind. 185; *Ward v. Colyhan*, 30 Id. 395.

10. The court erred in permitting witnesses to state that upon reading the alleged libelous article they understood that it referred to plaintiff. They were not claimed to be in possession of any extrinsic facts that would render their understanding of the article any more valuable than that of any other person; citing *Smart v. Blanchard*, 42 N. H. 137; *Rangler v. Hummel*, 37 Penn. St. 130; *Van Vechten v. Hopkins*, 5 Johns. 226; *Gibson v. Williams*, 4 Wend. 320; *Snell v. Snow*, 13 Metc. 278; *Gribble v. Press Co.*, 37 Minn. 277.

Charles Kudner (*Edwin F. Conely*, of counsel), for plaintiff, contended:

1. The construction to be put upon any language, spoken or written, must be that which is consistent with the whole of the speech or writing. Thus the language of any part of a writing is to be construed with reference to the entire writing, and the language of any part of an oral discourse is to be construed with reference to the entire discourse; citing Townsh. Sland. & Lib. §§ 133, 137, and notes; Odgers, Lib. & Sland. 98, and notes; *Morehead v. Jones*, 2 B. Mon. 210.

2. For the purpose of its construction, language is to be regarded not merely in reference to the words employed, but according to the sense or meaning which, all the circumstances of its publication considered, the language may be fairly presumed to have conveyed to those to whom it was published; citing Townsh. Sland. & Lib. § 133, and notes; Locke, Cond. Understg. § 35; *Roberts v. Camden*, 9 East, 93; *Harvey v. French*, 1 Cr. &. M. 11.

3. The intention or motive with which the words were employed is, as a rule, immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend to do so, and had no such purpose in his mind when he spoke or wrote the words; citing Odgers, Lib. & Sland. 5, 6, and note *a*, 153, 154; Townsh. Sland. & Lib. (3d ed.) 134 (notes), 142, 681, 683; yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum, if the fault itself is not serious, and there should be no unreasonable responsibility where there is no actual malice; citing *Bailey v. Publishing Co.*, 40 Mich. 251.

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4. The defendant's contention is that defamatory language which may, and in fact does, injure a person, is not actionable, unless so framed as to exclude application to any other person. The existence of any such rule is denied. If the article on its face can and does purport to defame some one, whether it touched the plaintiff is a question of fact, and it will make no difference that it is capable of injuring another; citing Odgers, Lib. & Sland. 127, 129; *Maybee v. Fisk*, 42 Barb. 326; *Gidney v. Blake*, 11 Johns. 54; *Falkner v. Cooper*, Carter, 56; *Patterson v. Edwards*, 2 Gilm. 720.

5. Plaintiff may call at the trial his friends, or those acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff; citing Odgers, Lib. & Sland. 129, 589; 2 Stark. Ev. 461: *Smart v. Blanchard*, 42 N. H. 137; *Mix v. Woodward*, 12 Conn. 262; *Goodrich v. Davis*, 11 Metc. 473; *Miller v. Butler*, 6 Cush. 71; *McLaughlin v. Russell*, 17 Ohio, 475; *Smawley v. Stark*, 9 Ind. 386; *Russell v. Kelly*, 44 Cal. 641; *Machine Co. v. Souder*, 58 Ga. 64; *White v. Sayward*, 33 Me. 322; *Cresinger v. Reed*, 25 Mich. 450; *Van Vechten v. Hopkins*, 5 Johns. 211; *Gibson v. Williams*, 4 Wend. 320; *Rangler v. Hummel*, 87 Penn. St. 130; *McCue v. Ferguson*, 73 Id. 333.

MORSE, J. The only error that I can find in this case is the refusal of the court to give the third request of defendant, to wit:

"If you find that at, and for a length of time prior to, the publication of the article sued upon, the plaintiff was universally or generally known as 'John D. Finnegan,' and not as merely 'John Finnegan,' and that such initial letter, 'D,' had been adopted by him expressly to distinguish him from persons known as 'John Finnegan,' then this article sued upon will not be presumed to have had reference to the plaintiff; and, as there is no evidence in the case that he is the person referred to in the said article, your verdict in that case must be for the defendant."

This request should have been given. If the plaintiff was generally known as "John D. Finnegan," and he himself had assumed that name to distinguish him from "John Finnegan," the use of the name "John Finnegan" by defendant could not be a libel upon plaintiff,

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unless malice was shown in the publication, intended against plaintiff, or that the plaintiff was intended as the person mentioned under the name of "John Finnegan," and the publication was made without express malice, but with such want of care that the law would imply it.

I think the verdict, under all the circumstances of the case, was excessive; but this we, as an appellate court, cannot remedy.

For this reason the judgment must be reversed, and a new trial granted.

CHAMPLIN, J. I concur in the reversal of the judgment.

LONG, J., concurred with CHAMPLIN, J.

SHERWOOD, C. J. The action in this case is for libel, based upon the following article, which appeared in the Detroit Free Press, a newspaper published by the defendant in the city of Detroit, on April 24, 1887, and which article the plaintiff claims was printed and published of and concerning him. It is as follows:

"John Finnegan borrowed Wolfgang Fellers' coat from the latter's saloon on Wednesday night, without the proprietor's consent. Last night he returned to the saloon, and tried to sell Fellers the coat. For this he was arrested, and locked up in the Central station, by officers Cahoon and Daley."

The plaintiff's declaration consists of a single count, and is as follows:

"For that the said defendant, wickedly intending to injure the plaintiff, heretofore, to wit, on the 24th day of April, A. D. 1887, at the city of Detroit, in said county of Wayne, did maliciously compose and publish of and concerning the plaintiff, in a certain newspaper called the 'Detroit Free Press,' a certain false, scandalous, and defamatory libel, containing the false, scandalous, and defamatory matters following, of and concerning the plaintiff, that is to say:

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"'John Finnegan (said plaintiff meaning) borrowed Wolfgang Fellers' coat from the latter's saloon Wednesday night, without the proprietor's consent (the defendant meaning thereby that plaintiff feloniously stole said Fellers' coat). Last night he returned to the saloon, and tried to sell Fellers the coat. For this he (plaintiff meaning) was arrested, and locked up in the Central station, by officers Cahoon and Daley (meaning thereby that plaintiff was arrested for the crime of larceny).'

"By means of the committing of which grievances by the said defendant the plaintiff has been brought into public scandal and disgrace, and greatly injured in his good name, and otherwise injured, to the plaintiff's damage ten thousand dollars; and therefore he brings suit, etc."

The defendant filed a plea of the general issue, and thereunder gave notice:

"That on the trial of the above-entitled cause the defendant will give in evidence, * * * and will insist in its defense, that, at the time of the publication of the alleged libel counted on by the plaintiff, the defendant was engaged in the publication of a certain newspaper known as the Detroit Free Press; that in the publication of such newspaper it was necessary, and it was the duty the defendant owed to the public at large, for the defendant to gather and publish items of news, and matters of public interest; that in the regular course of defendant's business, and in the pursuit of this business, defendant employed a responsible man, called a 'reporter,' to ascertain each day, from the police stations, all matters of public interest and general importance that had occurred at such stations during the day; that, in order to ascertain such matters, it was necessary for such reporter to visit such police stations each evening, and to make inquiries from the officers in charge at such stations, and to examine the blotter or register at such stations, on which was kept a record of arrests made; that on, to wit, the evening of the 23d day of April, A. D. 1887, the said reporter, in the regular course of his duty, visited the Central police station, in the city of Detroit, and examined the said blotter or register to ascertain what arrests had been made during the day; that on such examination the said reporter found on such blotter a name which appeared to be 'John Finnegan;' that said reporter then inquired of the officers in charge of such police station as to the reason for the appearance of such

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name on such blotter, and was informed by said officers that the said party whose name appeared on said blotter as aforesaid had been arrested for stealing, as set forth in the alleged libel counted on by the plaintiff; that the said reporter understood the said name to be 'John Finnegan,' and that he so read such name on the said blotter, without any negligence on his part; that the said reporter wrote the alleged libelous publication set forth in the plaintiff's declaration without any malice on the part of said reporter, and in the belief that the name of the person who had been arrested, as set forth in the alleged libel, was 'John Finnegan;' that the defendant published the alleged libel in good faith, without any malice towards the plaintiff, or towards any other person, and solely in the regular course of defendant's business, and in the pursuit of the duty that the defendant owed to the public at large; that the said defendant afterwards, to wit, on the 25th day of April, A. D. 1887, found out that the name of the person who had been so arrested as aforesaid was not 'John Finnegan,' but was a name which looked like and sounded like 'John Finnegan,' to wit, 'John Finnucan;' that defendant's said reporter had, without any negligence, mistaken such name for 'John Finnegan,' and had so understood such name; and that the falsity of the alleged libelous publication was due to mistake and misapprehension of the facts; that as soon as defendant ascertained these facts and this mistake the defendant published in the next regular issue of the said newspaper, to wit, on the 26th day of April, A. D. 1887, an explanation of the facts, and a correction, in as conspicuous a manner and place in said newspaper as was the article sued on as libelous. The defendant will therefore claim that the said publication was privileged, and will further claim that, if said publication should be held libelous, and not privileged, that the plaintiff can only recover such damages as plaintiff has suffered in respect to his property, business, trade, profession, or occupation, and no other damages."

The "explanation" and "correction" referred to in the notice are as follows:

"A SUIT FOR DAMAGES.

"Ex-Alderman John Finnegan commenced a suit in the Wayne circuit court yesterday against the Detroit

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Free Press for $10,000 damages for alleged libel. On Sunday the Free Press published an item to the effect that John Finnigan had borrowed a certain saloon-keeper's coat without the owner's consent, and had forgotten to return it, for which he was arrested. Through a typographical error the name of the coat-thief was spelled 'F-i-n-n-i-g-a-n,' when it should have read 'Finnecan.'"

Mr. John A. Bell was managing editor at the time the libelous article was published, and Frank H. Wakefield was the reporter who gathered the reports of criminal cases at the police stations, and wrote the article in question, which the manager allowed to be published.

The plaintiff was a well-known and prominent citizen of Detroit, was about 45 years of age, and had resided in the city of Detroit all his life, and during which time he had been a business man, served four or five years upon its common council, and four upon its board of education; and for many years his residence has been at No. 206 Orchard street.

The case has been tried twice in the circuit court for the county of Wayne. On the first trial plaintiff recovered a judgment for $1,500. This verdict was set aside as excessive, and a new trial granted. The new trial has been had, and a verdict obtained against defendant for $800; and the proceedings upon this last trial are now before us for review. The defendant brings the case here by writ of error. The case was submitted on the briefs of counsel, and without oral argument.

Sixteen errors are assigned on the record, relating to the rulings of the court in taking the testimony in the case. The first is that the court allowed any evidence to be given in the case,—

"For the reason that there was no proper *colloquium* in the plaintiff's declaration upon which to found the innuendo that the defendant thereby charged the plaintiff with the crime of larceny."

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There is nothing in this objection. There can be no *colloquium* in libel, except that which appears in the libelous article itself, and, with the innuendoes appearing in the declaration, the latter is sufficient, if maintained by proof, to support the action therein stated.

The second assignment of error is that the court permitted the plaintiff to introduce in evidence the "Central Station Blotter." It appeared from the testimony of the defendant's witness that the police reporter obtained his information of what was done, and what occurred before that court, and the action of the police, in part, from this blotter; and, to show the reckless manner and utter want of care exercised by the reporter in this case, the blotter was offered in evidence by plaintiff, by which it appeared the arrest actually made was of one John Finnucan, in plain writing, and that plaintiff's name did not appear on the blotter at all, with or without the middle letter, "D." This testimony was properly admitted. There may be such a degree of recklessness and want of care as to show wantonness and willfulness; and I have no doubt it may be carried to the extent that its effect would tend to show malice. Reckless conduct in publishing a newspaper is no more to be tolerated than in any other kind of business. In this case it appears that Sergeant Martin, at the police station, narrated to the reporter the circumstances of the case, and did not mention the name of John Finnegan, or any other Finnegan. The reporter did, however, read the blotter, where the name of the arrested person appeared. The reporter says he never looks up the residence of a person charged with crime, and that it is not considered "big news" to report that a man was arrested upon a charge of larceny, unless there are aggravating circumstances. The item in this case, after being written, was brought under the observation of Manager Bell. The care the defendant gave the

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matter appears in the testimony of Mr. Bell. On his cross-examination he says that all local news that came in was brought by the city editor to witness; that witness read it before it went up-stairs, so that anything that, in his judgment, was improper, would be suppressed by him, or he would do whatever else was required with it.

"*Q.* How would you be able to tell whether it was proper or not,—of your own intuition?

"*A.* I could not tell of my own intuition.

"*Q.* What means would you take to find out whether anything was false or true?

"*A.* I could not give personal investigation to every item that came in under my charge,—that I saw.

"*Q.* You did not undertake to do that?

"*A.* No, sir.

"Q. Did you ever undertake to do anything that way?

"A. Well, very many matters are published locally that are within my own knowledge,—the main events and occurrences; and if I saw that the reporter had made an incorrect statement, if it was within my own knowledge, I would necessarily correct it.

"*Q.* Suppose it was not within your own knowledge?

"*A.* If the item came to me with the appearance of being correct, and with nothing on its face showing that it was not correct, of course, I would pass it.

"*Q.* Suppose, then, an item came in, and you did not happen to know the man, and he was charged with larcency. Would you put it in without an investigation?

"*A.* I would assume that it was true.

"*Q.* You assumed that this article sued upon was true?

"*A.* Yes, sir.

"*Q.* Did you take any pains whatever to see if it referred to any John Finnegan that you knew?

"*A.* I did not.

"*Q.* Did you take any pains whatever to see whether it was true of the supposed John Finnegan?

"*A.* I simply read the item, and sent it up-stairs.

"*Q.* So that, as a matter of fact, you took no pains whatever regarding this item, to see whether the statements were true or false?

"*A.* No, sir."

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Witness further testified that, as a general rule, he never undertook to verify statements made in an article like the one sued upon; that when the reporter came in with this item he did not interrogate him as to it; that he did not ask him the source of his information; that he did not ask him who this John Finnegan was, or anything about the facts, or what means he had for believing the item to be true as to anybody. Witness further testified that the Free Press has a telephone, and had telephonic communication with police head-quarters, and that no attempt was made to use it in this case. It would seem that more care than is here shown to protect a man in his reputation for honesty and integrity, and as a law-abiding citizen, which had taken a life-time to establish, ought to have been observed. At the time the libelous article appeared in the Free Press, no other person than the defendant, by the name of "John Finnegan," lived in Detroit."

Under the ruling of the court, against the objection of defendant's counsel, the plaintiff was permitted to show by what name he was known while a member of the common council; that he was known as "John Finnegan." This is defendant's third assignment of error. We see nothing in this of which defendant can complain. It appears in the testimony that plaintiff added, as a middle letter, "D" to his name, while a member of the "National Guards," to distinguish him from another member of the same name, living in the city at that time. For the purpose of showing that there was no other person living in Detroit at the time the article was published bearing the plaintiff's name, and that his name was as stated in the declaration, the plaintiff was permitted to show in evidence—

1. The city directories upon the subject for the years 1886 and 1887.

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2. Letters addressed to him while he was a member of the board of education, and continuing to and including 1886.

3. His father's last will, dated in 1871.

4. A bond and mortgage made by himself and mother to the savings bank.

These pieces of testimony were all objected to by defendant's counsel, and exceptions taken to the rulings admitting them, and are all included in the fourth to the eighth assignments of error, both inclusive. We think the objections were properly overruled. The testimony is such as is usually accepted and relied upon to establish the same facts in transactions involving the most important business in life, and I see no reason why it should not be held competent in a court of justice. This is not a criminal case, where the greatest circumspection and care are required. If, however, we were to hold the testimony was not properly admitted, the error is a harmless one, for the reason that it is admitted that the plaintiff's name was "John Finnegan," except as he added the "D," as before stated, and that both mean the plaintiff. The middle letter is no part of a man's name in a civil action; and in no event could the defendant's rights be prejudiced by its use, as the record shows the same disregard and recklessness in the one case as the other.

For the purpose of showing that the article pointed to the plaintiff, and would be most likely to be understood by his acquaintances and friends, when read, as referring to him, several persons residing in Detroit, and who had long known the plaintiff, were asked by plaintiff's counsel, when they were on the stand, to whom did they understand the article to refer when they read it, and what was said about it upon that subject, and its effect. This testimony was objected to as incompetent. It was competent, and the fact as to how the article was understood among plaintiff's acquaintances was one of the most

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important in the case. It was the principal element in the damages sustained; and no one knew better, or could speak with more accuracy, than these acquaintances themselves. It was in this way the plaintiff's damages, if any, arose; and proof could not be better made than by those who could speak from their own knowledge upon the subject, and had heard others talk about it. This covers defendant's assignments of error from the ninth to the thirteenth, both inclusive.

The fourteenth assignment relates to the ruling of the court on the defendant's motion to take the case from the jury, and direct a verdict for the defendant. The denial of this motion was proper. The case was clearly one for the jury.

When the reporter, Wakefield, was upon the stand, counsel for the plaintiff asked the witness, upon his cross-examination, the following question:

"Did Sergeant Martin convey the idea, whoever it was, that he had been stealing a coat?"

Witness replied that was the idea he gathered. The court refused to strike out the testimony of this witness, "that he understood that Finnegan had been charged with the crime of larceny," when asked to by defendant's counsel; and these exceptions are the subject of the defendant's fifteenth and sixteenth assignments of error. This testimony was competent on cross-examination. It was entirely proper to show that the offense the witness was then writing up, with the intention of giving it to the public, was one of larceny, and a crime.

At the close of the trial, counsel for defendant presented the following requests to be given in the charge, among others, viz.:

"1. If you find that at, and for a length of time prior to, the publication of the article sued upon, the plaintiff was universally or generally known as 'John D. Finne-

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gan,' and not as merely 'John Finnegan,' and that such initial letter, 'D,' had been adopted by him expressly to distinguish him from persons known as 'John Finnegan,' then this article sued upon will not be presumed to have had reference to the plaintiff; and, as there is no evidence in the case that he is the person referred to in the said article, your verdict in that case must be for the defendant.

"2. A name voluntarily assumed by a person for a lawful purpose, though differing from the one given to him by his parents, may become, to all intents and purposes, the name of the person assuming it.

"3. It being conceded that the article upon which suit was brought was not intended to refer to the plaintiff,—that it did not point to him, except in the use of the name 'John Finnegan,'—I charge you that, in order for him to recover in this suit, he must establish by evidence, to your satisfaction, that the effect of the article as it appeared in the newspaper was to point to him, and no other person of the name of 'John Finnegan.' In other words, he must, by his evidence, exclude all inference that the article, upon its face, pointed to any other person than him.

"4. The law only knows one name for a person; and, inasmuch as the plaintiff admits that in 1873, or thereabouts, he assumed the name of 'John D. Finnegan,' to distinguish him from persons of the name of 'John Finnegan;' that since that time he has held office in this city under the name of 'John D. Finnegan,' and always, while acting officially, used that name, and otherwise held himself out to the public as the person of that name, —I charge you that he thus voluntarily assumed that name, and all persons in the community in which he lived had the right to so understand and treat him as the person possessing such name; and he has no right to complain of an injury done to him by the publication of an article which referred to some other person, of a different name, and not intended to refer to him, simply for the reason that some of his neighbors were mistaken in supposing it referred to him.

"5. Actual damages are, in this case, such only as the plaintiff actually suffered. These damages, if any, are to be measured justly and fairly, and as nearly as possible by a money standard for the injury received by him. They

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should not be fanciful or imaginary damages, but such only as you can clearly see arise naturally and necessarily from the circumstances of the case. Damages are given as compensation, and as compensation only, for injuries received, and should not exceed the amount of such just compensation; and no exemplary or punitive damages can be added by you, beyond what is based upon the actual injury done to the plaintiff, measured in dollars and cents.

"6. You should consider the care taken by the reporter in the preparation of the item sued upon; and any of the circumstances, which may have been shown, which would naturally lead him to commit an error, should be considered by you in reduction of the damages, if any, to be awarded to the plaintiff."

The first request was properly refused. The request, taken as a whole, is an instruction to render a verdict for the defendant. Whether the plaintiff was the person intended or referred to in the article as the thief, was a question of fact solely for the jury, under proper instructions from the court.

In regard to the second request, it is not applicable to the case at all. It goes upon the theory that plaintiff assumed a name other than his own, and there is no testimony in the case showing such assumption; and therefore the refusal was correct. The adoption of a middle letter in a name does not make it a new name; neither is it the assumption of another name. And, if he was the only John Finnegan in Detroit, who could the article have referred to, if not to him, or be presumed to have referred to? The person to whom it did refer certainly lived in Detroit.

The third request has the same infirmity as the second. It takes the article out of the circumstances existing at the time it appeared in the paper, and assumes that the plaintiff must prove a negative, viz., that the article pointed to no other person. This was not necessary. If

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the article, under all the circumstances, referred to the plaintiff, with such reasonable certainty as to induce the belief that the plaintiff was the man intended, it was sufficient. In such case it is for the defendant to satisfy the jury that not only was it not intended to refer to the plaintiff, but that the article, under no reasonable construction, would be likely to be so understood by the acquaintances of the plaintiff. With a very little care, much less than what is known as "ordinary care," the article could have been prepared so as to have avoided all danger of doing injury of the kind complained of in this case; and if, by so doing, an article does lose a portion of its sensational character, or, as the reporter says, should fail to become "big news," it will not bring pain and anguish to the friends of the injured party, and to himself the mortification and disgrace so often felt by the innocent, and for which the coffers of a reckless press can never make adequate atonement.

The frequency of this class of cases appearing in courts of last resort very clearly indicates that there is a strong public feeling existing that individuals are far too often subjected to injury and wrong through the careless and negligent conduct and management of journalism in this regard. The cases do not arise so much from the avarice of shysters, or the disposition to blackmail the press by unconscionable and adventurous suitors, as counsel for defendant suppose, but rather from a public feeling that the course pursued is wrong; that more care should be used in making attacks upon the character and reputation of private citizens; and that the evil complained of should be abated,—and this feeling is fast ripening into a public sentiment upon this subject. Shysters, blackmailers, and unconscionable and adventurous suitors do not mould or make public sentiment in this country. It springs from a sense of injury, either to person, reputation, character,

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or property, and the progress of such sentiment as frequently discloses itself in the jury box as anywhere else; and, however much courts may seek to control it, and preserve the rights of suitors, they are powerless, comparatively, in cases resting so largely on the questions of fact involved. The request under consideration asks for too much.

The defendant's fourth request invades the province of the jury, and asks the court to assume certain facts which could only be found in this case by the jury, and for that reason was properly omitted from the charge.

The fifth request relates to the subject of damages, and all that was necessary to be placed before the jury contained in this request was given in the charge of the court; and I see no error in refusing to charge as requested.

The sixth request was sufficiently covered by the general charge of the court.

In the argument of counsel for plaintiff upon the facts to the jury, he stated to them what he conceived to be the law upon several points. Exception was taken to these statements. There was nothing objectionable in this. The court could correct him, if any mistakes were made by counsel. The argument of the facts by counsel is made upon his understanding of the law; and, unless permitted to do this, many times the argument would lose very much of its force.

Defendant's assignments of error, twenty-fifth to twenty-eighth inclusive, relate to four separate paragraphs of the charge, taken from that part given upon the court's own motion, and which are as follows:

"I charge you that, in order for him to recover in this suit, he must prove by evidence, to your satisfaction, that the effect of the article, as it appeared in the newspaper, was to point to him, and to no other person by the name of 'John Finnegan.' A written or printed publication

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of a person is libelous on its face, and therefore actionable *per se*, when it charges him with the commission of a crime, or induces the belief that he has committed a crime, or tends to bring him into public disgrace, or imputes something disgraceful to him, or throws odium upon him, or induces an ill opinion of him in the community. Such publication is presumed to be both false and malicious. Whether the article complained of relates to the plaintiff, or was calculated to injure the plaintiff, is a question for you alone to determine, by the facts and circumstances of this case. If the article related to the plaintiff, and was calculated to injure him in respect to his reputation or standing in the community, then, as to him, it is libelous."

"Identity of name is evidence of identity of person."

"If the article related to the plaintiff, and was calculated to injure him in respect to his reputation and standing in the community, then, as to him, it is libelous."

"And right here, let me state to you, gentlemen, that you have heard the article which was published by the defendant two days after the libel was published, and, if you believe it was intended as an apology, you may consider it, as bearing upon the question of exemplary damages."

I have been unable to discover any error in either of these paragraphs, as they stand in the charge as given. The entire charge has been examined, and I have found no fault in it. Of course, identity of name is not conclusive evidence of identity of person.

I do not think the article called an "apology" or "retraction" was either. One thing it does, however. It shows that the defendant regarded the original article referred to as charging the party named as taking the coat with larceny. The article is a simple announcement that the defendant had been sued for libel, and that they had made a mistake, a typographical error, in the article. There is no expression of regret that it had occurred, or intimation that it could have harmed any one, or, if it had, that defendant was desirous of making amends for the injury in any way.

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The record shows a fair trial of the cause before a jury, under instructions as to the law more favorable than the defendant had a right to expect. The article is libelous upon its face. It charges John Finnegan with arrest for the commission of a crime. He was known to the manager of the paper, and there was no other John Finnegan residing in Detroit at the time. It is of no consequence, so far as maintaining the action is concerned, that it was not the intention to libel the plaintiff at the time. The acquaintances of plaintiff had no difficulty in determining from the article that the plaintiff was meant. His name was that contained in the article, and it charged him with crime. The rule holds the article libelous *per se* if it charges one with crime, and describes the plaintiff with sufficient certainty to enable his personal acquaintances, on reading it, to apply to him the slanderous imputations; and there is no question but that the party actually arrested lived in Detroit, as well as the defendant. Mistakes will not excuse liability, although they may be urged to reduce the extent thereof, and will often reduce the damages to a minimum, according to the degree of care exercised. Libels are usually published through mistake, indifference, carelessness, negligence, recklessness. But, if the publication is libelous, mistake, indifference, carelessness, negligence, recklessness, go to the *quantum* of damages, not to the right of recovery. The trial judge summed up the law of this part of the case very tersely and very clearly.

"Mistake is not justification, and can only be asserted in mitigation of damages."

The rights of the defendant were well guarded in the charge, in all essential particulars.

"The intention or motive with which the words were employed is, as a rule, immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable,

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although he did not intend so to do, and had no such purpose in his mind when he spoke or wrote the words." Ogders, Lib. & Sland. 5.

"Malice in fact need never be proved at the trial. The words are actionable, if false and defamatory, although spoken or published accidentally, or inadvertently, or with an honest belief in their truth." Id. 6, and note *a*, 153, 154; Townsh. Sland. & Lib. 134 (note 2), 142, 681, 683.

"Yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum, if the fault itself is not serious; and there should be no unreasonable responsibility where there is no actual malice." *Bailey v. Publishing Co.*, 40 Mich. 257.

But actual damages are always recoverable.

"Character is as sacred as property; and every one is entitled to its protection, under the law, as a fundamental legal right. Such has been, as I conceive, the unquestioned doctrine at all times; and it is the only doctrine under which the reputation of citizens can be preserved from assault. Good faith diminishes the injury, and in many cases may reduce the damage to a minimum; but it is impossible to hold that it entirely destroys the damages, and in civil cases such is not the accepted law."

In this case the plaintiff undertook to satisfy the jury of the application of the libelous article to the plaintiff. The right to do this cannot be denied, but the proofs offered were claimed to be incompetent. As I have already said, I have no doubt of their competency.

"Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still, an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself." Odgers, Lib. & Sland. 128.

"So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also of

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any statement or declaration made by the defendant as to the person referred to. The plaintiff may also call at the trial his friends, or those acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff." Odgers, Lib. & Sland. 129, 539; 2 Stark. Ev 461; *Bourke v. Warren,* 2 Car. & P. 307; *Broome v. Gosden,* 1 C. B. 728; *Du Bost v. Beresford,* 2 Camp. 511; *Cook v. Ward,* 4 Moore & P. 99, 6 Bing. 409; *Smart v. Blanchard,* 42 N. H. 137; *Mix v. Woodward,* 12 Conn. 262; *Goodrich v. Davis,* 11 Metc. 473; *Goodrich v. Stone,* Id. 486; *Miller v. Butler,* 6 Cush. 71; *Leonard v. Allen,* 11 Id. 241; *McLaughlin v. Russell,* 17 Ohio, 475; *Smawley v. Stark,* 9 Ind. 386; *Tompkins v. Wisener,* 1 Sneed, 458; *Morgan v. Livingston,* 2 Rich. Law, 573; *Russell v. Kelly,* 44 Cal. 641; *Machine Co. v. Souder,* 58 Ga. 64; *Com. v. Buckingham,* Thatcher, Crim. Cas. 29; *Briggs v. Byrd,* 11 Ired. 353; *Harrison v. Thornborough,* 10 Mod. 196; *Maybee v. Fisk,* 42 Barb. 326; *Gidney v. Blake,* 11 Johns. 54.

When the libel does not, on its face, appear to relate to the plaintiff, it must be shown in what way it relates to him, notwithstanding the previous averment that it was published concerning him. *Clement v. Fisher,* 7 Barn. & C. 459. In this case, however, I think, upon its face, the alleged libel, under the circumstances, appears to relate to the plaintiff; and it seems to me difficult how any other conclusion can well be reached. The judgment should be affirmed.

CAMPBELL, J. I think the error shows nothing which in law should reverse the judgment.

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CATHERINE RAJNOWSKI, ADMINISTRATRIX, ETC., v. THE DETROIT, BAY CITY & ALPENA RAILROAD COMPANY.

[See 74 Mich. 20.]

Negligence—Assignment of interest in suit as security.

1. An assignment of plaintiff's claim for damages in a pending suit, to secure her attorneys for their services, is not a bar to its continued prosecution in plaintiff's name.
2. In this case it is held that the record is substantially the same as on the former hearing, and presented issues for the consideration of the jury, and that their finding cannot be disturbed.

Error to Alpena. (Kelley, J.) Argued November 6 and 7, 1889. Decided December 28, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

A. M. Henry (*John C. Shields*, of counsel), for appellant.

Cobb & Currier (*Depew & Rutherford*, of counsel), for plaintiff.

[Reference is had to the opinion, and a former report of case in 74 Mich. 20, for the points and authorities of counsel.—REPORTER.]

LONG, J. This case was before this Court at the January term, 1889, and is reported in 74 Mich. 20 (41 N. W. Rep. 847). The cause was retried in the Alpena circuit court, where plaintiff had judgment for $1,500. Defendant brings error. The facts are quite fully stated in the former opinion, and need not be restated.

The claim of defendant's counsel now is:

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1. No negligence amounting to a cause of action was made out against the defendant.

2. The plaintiff throughout the entire trial relied for a recovery upon the claimed negligence of the defendant in allowing the engine No. 16 to get out of repair, and every particle and *scintilla* of proof was directed to the establishment of that claim; but the jury find that the engine was in good repair.

3. The plaintiff parted by assignment to her attorneys of all interest she had in the suit.

4. Contributory negligence would, at any rate, prevent a recovery.

The case presents but few new features from those presented on the former record, so far as the testimony goes that was offered and received, except that Mr. A. L. Powers, chief of the fire department of Alpena, who was called as a witness for the defendant, gave it as his opinion that the fire originated inside the house.

The first proposition of the counsel for defendant was fully met and answered by Mr. Justice CHAMPLIN in his opinion on the former hearing, in which he said:

"It is also claimed that the injury resulting to plaintiff's intestate is too remote from the neglect charged to constitute a liability on the part of the defendant. In this position we cannot agree. Neither can we agree that there was a new and independent cause of the death of the intestate other than that caused by the negligence of the defendant. If, through the negligence of defendant, sparks and cinders, alive with fire, escaped from its engine, and set fire to the house, defendant is liable for all the loss of life and property which was destroyed by such fire, without any contributory negligence on the part of the party bringing the action."

The evidence in the present record presented by the plaintiff is substantially the same as on the former hearing, and we think presented issues for the consideration of the jury.

The second point made by counsel has reference to the finding of the jury upon the special questions presented by counsel for defendant, as follows:

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"1. If you find the defendant was guilty of negligence causing the death, state what was the particular act of neglect or default it was guilty of.

"2. Was the engine inspected by Smith the Sunday after the fire, and found by him in good repair?

"3. How long was it after Mrs. Zielinski found the house was on fire before the arrival of the fire department?"

To the first question the jury answered, "Negligence of the engineer;" to the second they said, "We believe it was;" and to the third, "We cannot tell."

The declaration not only counts upon the negligence of defendant in permitting its engine to be out of repair, but also in its bad management by the engineer. The charge of the court, referring to this branch of the case, shows how the case was viewed upon the trial, and that at least the trial court thought there was some evidence to go to the jury upon either branch of the case made by the declaration. The court, in speaking in its charge of the condition of the engine, and the negligence of the engineer, said:

"And if you determine that it was not in that condition, and that it was out of repair; that the defendant had been negligent and was negligent in operating this locomotive in a condition that permitted it to throw off unusual quantities of fire, large sparks, and sufficient to ignite the building,—then I say to you it would be an act of negligence," etc.

From an examination of the record, I am satisfied there was some evidence to go to the jury upon both theories,—that of the defective condition of the engine at the time of the fire, and the improper manner of operating it by the engineer. Upon this latter branch the jury have found that that was the primary cause of the fire, but their answer to the special question put does not of itself negative the idea that the engineer was running the engine while it was in a defective con-

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dition. In fact, the jury must have had in mind, in considering this question, the defective condition of the engine, as well as the negligence of the engineer in operating it in that condition. We see no error in the charge, and there was some evidence to support the verdict and special finding of the jury. As was said by Mr. Justice CAMPBELL in the case brought by the same plaintiff against the company to recover for the value of the goods destroyed in the same building, reported in 74 Mich. 15 (41 N. W. Rep. 849):

"There was very strong testimony to the effect that the engine was in perfect order and properly managed, and that no such scattering of fire as was charged was probable or possible. But there was, on the other hand, testimony equally positive of such an escape of fire as indicated both a defective spark-arrester and careless management."

The claim made that the plaintiff had parted with her interest in the suit has little force. Evidently the assignment was made by way of security merely, and we see no objection to the suit being carried on in the name of the plaintiff.

The claim that the plaintiff was guilty of such contributory negligence as to prevent a recovery was one for the jury, and fairly submitted, and need not be discussed.

Defendant's counsel also claim that the testimony showed conclusively that the fire caught from inside the house. While there was testimony pointing strongly to that theory of the origin of the fire, yet the question was fairly submitted to the jury, and they have determined otherwise, under the facts presented by the evidence, and their finding cannot be disturbed.

We find no error in the record, and the judgment must be affirmed, with costs.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred.

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MALCOLM McDONALD v. GEORGE L. MALTZ.

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Statute of frauds—Contract for purchase of land.

A verbal agreement to purchase land and convey it to a "pine-land broker," in payment of his commissions on a land sale, is void under the statute of frauds.

Error to Alpena. (Simpson, J., presiding.) Argued November 7, 1889. Decided December 28, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Depew & Rutherford, for appellant.

Turnbull & Dafoe, for plaintiff.

CHAMPLIN, J. McDonald had examined and estimated the pine upon two parcels of land belonging to one Ortmann, who resided in the city of Detroit. It appears that McDonald was a sort of middleman or "pine-land broker," as they sometimes style themselves, who brought sellers and purchasers of pine land together, and obtained a commission from one or both parties for making the sale.

McDonald claims that he saw Mr. Maltz before going to Detroit to see Ortmann, and told him he had pieces of land, and asked him, if he could buy them right would he go in; and he told him if they were suitable, and all right, he would go in. He negotiated with Ortmann, and finally agreed upon a contract price of $17,000 for one tract, and $4,000 for another. He directed Ortmann to have the contracts made out to Maltz as purchaser, and send them forward to the Alpena National Bank for

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collection. That they were so forwarded, and that then he made an agreement with Maltz that he should take the contracts, and pay him $1,000 for the $17,000 contract, and he should purchase two 40-acre lots, worth about $100 each, from Albert Pack, and convey them to McDonald for his commission on the $4,000 lot; that he had asked him to pay him $200 on the $1,000, and he refused.

Mr. Maltz claims that McDonald came to him some time previous to September 8, 1887, and said he had some minutes of pine land, and he might want the contract put in his name; that it was a good thing, and he would have somebody buy it soon after the contract arrived at the city of Alpena. About September 10 two contracts came to the Alpena National Bank, with drafts attached. One was for $17,000, and the other $4,000, and the first payment was to be $5,250. He informed McDonald, and he said it was all right, that he had three or four fellows, and wanted him to hold on a few days, and the drafts would be taken off of his hands; and it ran along, and he still wanted him to hold on a few days longer. He told McDonald that the way the drafts were drawn they would have to be closed up in a day or two. That finally he came to Maltz, and told him that he thought he could get $21,000 if he (Maltz) would advance the first payment to carry the thing along. On the 15th he told McDonald that he would have to send the drafts back that day. He wanted Maltz to see Albert Pack, and, after consulting with him, he did advance the first payment, McDonald agreeing to sell the $17,000 tract for $20,000, and, when he did so, Maltz agreed to pay him $1,000. In regard to the $4,000 tract, he wanted Maltz to get two certain 40-acre lots from Pack, and convey to him. Maltz told him if he could get the land it would be equivalent to money, providing they made $400 or $500 on this

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$4,000 tract. Such were the claims and testimony of the two parties to this suit.

Plaintiff brought this suit to recover $2,000 for commissions on the purchase and sale of certain real estate which plaintiff procured for defendant, and caused to be sold to him. The declaration also contained the common counts in *assumpsit*. On request, plaintiff furnished a bill of particulars, in which he claimed commissions on sales of lands, referring to the lands in question. The plaintiff recovered, under his theory and the charge of the court, the $1,000 claimed, and also $200 as the value of the land agreed to be conveyed by Maltz to him.

This was error. The contract set out in the testimony of plaintiff, whereby Maltz agreed to purchase the two 40-acre tracts, and convey to him, was void under the statute of frauds, and could not serve as a basis of the recovery of the value of such lots. The court in his charge made a slight mistake in stating the respective claims of the parties, and the testimony by which they were sustained, which will not likely occur upon another trial, and need not be noticed.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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DAVID KINNEY v. FOLKERT C. FOLKERTS ET AL.

Master and servant—Negligence—Damages—Evidence.

1. If a defendant (in a negligence case), by his own act, has thrown the plaintiff off his guard, and given him reason to believe that vigilance was not needed, its lack on the part of the plaintiff is no bar to his claim. *Railroad Co. v. Ogier*, 35 Penn. St. 60;

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Ernst v. Railroad Co., 35 N. Y. 9; *Totten v. Phipps*, 52 Id. 354; *Morrissey v. Ferry Co.*, 47 Mo. 521.

2. In a negligence case, where the injury was permanent in its character, the court, in charging the jury on the question of damages, used the following language, in substance: "Perhaps a nearer rule—and I do not give it to you as a controlling rule—would be such a sum of money as, put at six per cent. interest, might earn a sum equivalent to the difference in plaintiff's wages before and after the accident. To illustrate, if he could have earned $600 a year before, and can now only earn $300, a sum of money that, at the ordinary rate of interest, would produce $300 per year would fully compensate him for his loss. Perhaps this would be too large an amount, because you should take into consideration the contingencies of ill health, the inability to secure work, and other contingencies incident to human life." The court is held to have erred in using the illustration, for if the jury might give an amount which, thus placed at interest, would produce the amount representing the loss in plaintiff's earning capacity, it would be a perpetuity, which he is not entitled to have.
3. Where in a negligence case a witness for the defendant testified that plaintiff told him that he bid not know how he came to be injured, it is error to allow the plaintiff to testify, on rebuttal, that at about the time of the alleged statement he stated his case fully to his attorneys, and substantially as testified to upon the trial, in which testimony he explained fully how the accident happened.
4. A statement by an employer, soon after an accident to an employé, "that he would see him through all right, and not to worry," is in no sense a confession or admission of liability, and evidence of the making of the same is inadmissible in a suit for damages by the employé.

Error to Alpena. (Kelley, J.) Argued November 7, 1889. Decided December 28, 1889.

Negligence case. Defendants bring error. Reversed. The facts are stated in the opinion.

Frank Emerick (*John C. Shields*, of counsel), for appellants.

Turnbull & Dafoe (*Depew & Rutherford*, of counsel), for plaintiff.

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[The opinion states and discusses the points of counsel. —REPORTER.]

LONG, J. The declaration in this cause contained three counts.

In the first it is alleged, substantially, that the defendants, under the firm name of Luther, McNally & Co., were, on October 8, 1888, at Alpena, engaged in carrying on a planing-mill, and running and using in said mill a certain machine, called a "fan," for the purpose of sucking up and blowing the shavings made at said mill to various places; that such fan is composed of a wheel, with arms, incased with a covering, with certain pipes attached thereto, said fan being driven by certain pulleys and belts, and revolving at great speed; that, plaintiff being on said day engaged in repairing and changing the pipes attached to said fan, he notified the defendants to stop said fan, and not allow said fan to be started or put in motion while he was repairing the same; that defendants did stop the same, and promised plaintiff not to start the same for one hour, or while plaintiff was working around it; that as soon as said fan was stopped, and became motionless, he proceeded with said repairs, detached the pipes from said fan, when the defendants, within said hour, ordered plaintiff to replace said pipes, and re-attach the same to the fan, which he proceeded to do; that the defendants, without notice or warning to plaintiff, wrongfully and negligently started the fan, and put the same in motion, and, while the plaintiff was engaged in replacing and re-attaching said pipes, without fault or negligence on his part, the fan then struck and came in contact with the plaintiff's left hand, crushing and mangling it, etc.

The second count charges that after he had removed the pipes he was ordered by the defendants to replace the

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same; that it was the duty of the defendants not to run said fan while he (plaintiff) was so re-attaching said pipes, yet the defendants carelessly and negligently ran said fan while the plaintiff was so engaged by order of defendants, by reason whereof the said fan came in contact with plaintiff's hand, greatly injuring it, etc.

The third count charges that it was the duty of defendants to keep said fan and machinery motionless while he was so replacing said pipes, and also to give plaintiff notice of the starting of said machinery and fan, yet the defendants, well knowing their duty, negligently disregarded the same, and did then and there, while the plaintiff was so engaged in re-attaching said pipes, without notice or warning to plaintiff, start and run said machinery and put the same in motion, thereby crushing and mangling plaintiff's hand, etc.

On the trial in the Alpena circuit court, plaintiff had verdict and judgment for $5,000. Defendants bring error.

The claim made in this Court is that the proofs do not support the declaration, and that the plaintiff's own testimony shows him guilty of such negligence that he is not entitled to recover. Some errors are also claimed in the admission of evidence and the charge of the court, as well as the refusal to charge as requested by defendants' counsel. These claims will be noticed further on.

On the trial the plaintiff gave evidence, in his own behalf, tending to show that he was a machinist, and had been working around the defendants' mill for some time, and had put up the blower, and attached the pipes for its effective working. The blower was encased in a box, was made of a wheel with paddles, something like a water-wheel, with a pully on each side, outside the box, to which the belts were attached to drive it; and the wheel made about 2,000 revolutions per minute. On the

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morning of October 8, 1888, plaintiff went to the mill, and defendant McNally wanted the pipes to the blower fixed. These pipes were attached to the outside of the box, and fastened against and to it with bolts or nails put through the flange of the pipes and a flange projecting from the edge of the box, on either side, and extending from the box, about eight feet from the floor, to the floor of the mill. These pipes were unbolted and taken down by the plaintiff on that morning, at the request of the defendant McNally.

Some contention arises here whether the pipe through which the plaintiff claims to have extended his arm at the time of the accident was a continuous pipe, reaching from the box to the floor, or whether it was one which had a joint some two feet from the box, the short, upper piece being an elbow which fastened to the box. The claim of the plaintiff is that there was such a joint or elbow, which he slipped apart at this joint, while the contention of the defendants is—and a great amount of testimony was given by defendants upon this point—that the pipe was a continuous one from the box to the floor, and contained no joint, and was not taken apart on that morning.

Plaintiff testifies that after the defendant ordered him to fix the pipe, and alter it so it would be placed over the shaft, he then told defendant he would have to stop the fan, when the defendant said, "All right. I will do so" (using the language of the plaintiff).

"So he shut down the mill, and was standing with me, and took off the belts of the blower, and immediately started running it again, and left the blower stopped; and I went to work and took the pipes down, and told my brother to take the pipes that I was to alter out in the shed adjoining, a few feet, where I was doing this work, and I stayed in, and told McNally not to put the belt on for an hour, and the boy (Sam Clark) said,

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'Can't you do it quicker?' I said, 'No, sir,' and he said, 'Why?' or something like that.

"McNally was then present. They stayed while I was taking the pipes down. Then I took a pipe, and leaned it up against the wall,—just a temporary pipe he had,—and took that and stood it on the floor, and said: 'There is no pipes for their shavings, and there is no use in running it; and when I am done I will notify you I am through.' So I went right along where my brother was, and was out there five or ten minutes, and Mr. McNally came along, and he said: 'Kinney, I want you to come in here and fit that temporary pipe—I want to start the blower—as quick as you can.' I said, 'All right,' and we both run right in quick, and I took this elbow and stuck it in the blower, and had the bolts in my hands, and jumped onto a horse, and run my hand right in the blower, and had my fingers clipped just like that. I pulled my hand out, and slung the elbow on the floor.

"*Q.* Did you know, at the time that you went in there with McNally, anything in reference to their having started the blower again?

"*A.* No, sir. It was just the same as I left it,—just from a glance,—just the same as I left it.

"*Q.* That is what you supposed?

"*A.* Yes. The pipes were off, and there wasn't nothing for making a noise,—no whistling or making a noise or anything, so you would hear it. If the pipes had been on, I might have heard the suction of the wind, but they wasn't.

"*Q.* If you had information that they had started that fan again, state to the jury whether you would have attempted to put on that pipe again.

"*A.* No, sir; I wouldn't, because you couldn't do it without getting your hand taken off. There is only that half-inch flange in there; and, if you put your hand through, you would get it taken off.

"*Q.* Did McNally, or any one of the other gentlemen there, say anything to you, or give you any notice that they had started that machinery again?

"*A.* No, sir. There was nothing said about it.

"*Q.* Had you any knowledge or notice at the time you went in there, and, if so, what, of the starting of that machinery again?

"*A.* No, sir. I didn't know nothing about it."

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On the cross-examination of the plaintiff, it appeared that there were two belts to drive the blower,—one on each side,—which ran down from a main shaft to pulleys outside of the box, and on either end of the shaft running through the wheel to which the paddles of the blower were attached. These belts were the only motive power of the blower, and, when in position to drive it, were within a few inches of the opening to which plaintiff was attempting to fasten the pipe. The pipe itself, as plaintiff claims, which he was attempting to put on, was an elbow some two feet in length, the part turning towards the side of the blower being only a few inches in length, and through which holes were made,—the bolts going through this into the flange on the side of the box; that, running in hurriedly, he stepped upon a sawhorse, to bring himself within reach of the box, put his arm through the pipe,—from the bottom upwards,—to feel for the bolt-holes; and, not knowing the fan was in motion, he extended his hand through the hole in the side of the box, and among the fans, and was injured. His attention being called, upon his cross-examination, to his care in going there, and his attempt to fasten the pipe on, he stated that he did not look to see if the blower was running.

The testimony of the plaintiff, while corroborated in most particulars by that of his brother, is disputed by the defendants, and several other witnesses, in almost every essential particular; Joseph McNally and others testifying that the blower was not stopped that morning for the purpose of fixing the pipes, and they further testifying that the pipe did not have a loose elbow, but was fastened together for its whole length, and was put on by nails put through the flange of the pipe and the flange on the box. Mr. McNally says that on that morning, finding that the pipe was not in place, and Sam Clark

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sweeping up the shavings from the floor preparatory to blowing them out, he inquired of Kinney, the plaintiff, who had come into the mill a few minutes before, where the pipe was; that he found the plaintiff in the shop, and asked him where the pipe was, and he said: "Oh, yes; I will go and get it." Then he turned, and went out of the shop, and out of the mill, and did not see plaintiff again until after the injury. That at the time of his asking for the pipe the fan was running, and had been all the morning.

If the testimony offered by the defendants is true, the plaintiff was guilty of gross carelessness in rushing in there and putting his hand into the fans of the blower. If the pipe was whole, and did not have this loose elbow which plaintiff claims, then the plaintiff could not have been injured as he claimed, as he could not have run his arm through the pipe and into the blower; the pipe being some seven or eight feet in length. But, in considering the questions raised by counsel for defendants, we must treat the case as made by the plaintiff's own evidence, however much we might have disagreed with the jury upon the proofs made by the evidence offered by both sides upon the points in controversy. That the plaintiff is seriously injured there is no disagreement.

Taking the facts, then, as they are made to appear by the plaintiff's testimony, the plaintiff was as familiar with the situation and surroundings there as the defendants. He had put up the blower and made the pipes. The blower was fastened to the timbers of the mill above the floor, and some 9 or 10 feet above it, and was driven by these two belts from a main shaft. One needs but little experience in machinery to know that a blower of that size (a model was produced before us as an exhibit), when driven by steam-power and making 2,000 revolutions per minute, fastened above as that was, must have

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vibrated greatly, and could not be run without great noise; and, the holes being open on the side of the box, the sucking in of the wind there must have added greatly to it. It is difficult to understand how one as much accustomed as the plaintiff was to machinery could go in there, when the fan was in motion,—with the noise made by it, and its vibratory motion, with these belts on either side coming almost in contact with his hands when attempting to put this pipe on, and within a few inches of his head as he stood upon the horse,—without noticing that this fan was in motion. His reply to a question put to him on his cross-examination, however, gives answer to these considerations; that is, that he was not looking to see if it was in motion. He was bound to use his faculties, and not to run heedlessly into danger. It is apparent, if he had used his eyes, ears, or sense of feeling, he would have seen the belts moving, heard the vibration and noise of the air being sucked in, and have felt, when his hand got near the hole in the box, the air being drawn in. He did neither.

In answer to these suggestions the claim is made that the plaintiff was thrown off his guard by the defendant McNally calling him to come quick and put the pipe on, as he wanted to start the blower; that, the blower not being in motion when he left it, this statement by McNally, that he wanted to start it, led the plaintiff to believe that it was then motionless; and that any ordinarily prudent man would have acted, under the circumstances, as plaintiff did, going in there under the belief that the fan was not in motion, without looking to see whether it was in motion or not. If this testimony is true,—and it was a question of fact for the jury, under proper instructions,—it accounts for the conduct of the plaintiff on that occasion; and, if an ordinarily prudent man would have done what the plaintiff did, under the

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circumstances, it cannot be said, as a matter of law, that he was guilty of negligence, but would, under such circumstances, be a question of fact, for the jury to determine.

The case was submitted to the jury by the court under a full and fair charge, and the facts found against the defendants, and, there being some evidence to support the findings, we cannot disturb the verdict. Upon this part of the case the court charged the jury:

"It makes no difference what McNally may have promised the plaintiff in regard to keeping the blower still or stationary during the hour while he was working on the pipes, if, when he came into the mill and approached the machine, by the exercise of ordinary prudence and care, a man of reasonable intelligence would have detected that the machine was in motion and dangerous. If, after that, he put his hand into that blower, he did it at his own peril, and would have no right to recover in this case. * * * If he knew that the machine was in motion, and approached it for the purpose of putting this elbow on there, knowing that it was dangerous,—being apprised of the danger,—he cannot recover in this action; but if, in the running of that machine and his coming into the mill, with all the confusion and noise that may have been in the mill at that time, with the other machines in operation, if an ordinarily prudent man might not have detected the fact that it was in motion, or might not have apprehended danger, and he approached it to discharge the duty that he was called upon to do, and thrust his hand in there, and Mr. McNally knew he was about to approach that machine in that condition, and do that work, * * * it would be negligence upon the part of the defendants in this case, and he would be entitled to recover."

Again, the court said:

"The one claim here is that they induced the plaintiff to suppose that that machine was stationary, and was not to be started again until he notified them, or until he ceased to work upon the pipe; and, if you should find that fact even existing to your satisfaction, if you find

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the other fact that in running this machine, that blower, when in motion, with its belts, its fans revolving,—everything in motion,—a man, in the exercise of ordinary prudence and caution, when approaching it, would be apprised of the danger, then the plaintiff would have no standing in this case, and cannot recover."

The instruction correctly states the law of the case, and put the case fairly to the jury upon the theory of the plaintiff, that when the plaintiff left the fan it was not in motion, and that he supposed it was to remain motionless until his return with the pipe, and when defendant McNally called to him to come quick and put the pipe on, as he wanted to start the blower, he went in full faith that the fan was yet standing still, and therefore did not look to see whether it was in motion or not. Under the circumstances, we think there was evidence to go to the jury upon this question, and the court was not in error in submitting the case to them.

There is no such variance between the proofs offered and the claim made by the declaration as claimed by counsel. Plaintiff did not rely solely upon the claim set up in the first count of his declaration, that the defendants promised not to start the blower until his return from fixing the pipe, but that it was the duty of defendants to have notified him of its having been started, and that when McNally called him in to put the pipe on he was misled by the statement that he wanted to start the blower. We think the declaration sufficiently broad to cover this theory of the case.

In 1 Shear. & R. Neg. (4th ed.) § 91, it is laid down as a rule of law that if the defendant, by his own act, has thrown the plaintiff off his guard, and given him reason to believe that vigilance was not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim. This rule is supported by *Railroad Co. v. Ogier*, 35 Penn. St. 60; *Ernst v. Railroad Co.*, 35 N. Y.

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9; *Morrissey v. Ferry Co.*, 47 Mo. 521; *Totten v. Phipps*, 52 N. Y. 354. The rule rests in good reason and common sense; and, if plaintiff's claim is true, he had every reason to believe, from the statements and conduct of McNally, that the fan was not in motion, was thereby thrown off his guard, and did not exercise that care and caution which the law otherwise would impose upon him.

We think there is no force in the claim, made by counsel for defendants, that the court did not properly instruct the jury as to the burden of proof on the question of the contributory negligence of the plaintiff, and shall not discuss it.

Counsel for defendants assigned error upon the instruction given by the trial court upon the measure of damages. Upon this question the court instructed the jury:

"You may consider the amount of actual expense he has been to in the way of doctors' bills, nursing, and medicine. You may also consider the loss of time he has been put to, his actual loss of service, his inability to work and attend to his ordinary business; and you have a right to consider, if this injury is permanent,—if it is permanent in character,—what loss of service he may sustain in the future. You have a right to take into consideration, should you find him entitled to recover, the physical suffering and mental anguish, the bodily pain and mental suffering, he has endured from the time that he was injured until he was restored to health.

"It is hardly possible for me to point out any definite rule that is to govern you as to the measure or amount you are to award; but these elements are the ones that should be taken into consideration by you, should you conclude that he was entitled to recover anything. I say to you that, upon the subject of substantial compensation for the injury, if it consists in the loss of service or the inability to provide for himself, or to earn a subsistence, that it would not be the rule to award him a gross sum aggregating the amount which would be just what he can earn less than what he was able to earn before.

"To illustrate, if he was able to earn three dollars a day

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before, and can only earn now one dollar a day, it would not be the proper rule of damages to award him two dollars a day. You should award him such a sum—such an amount—as would fairly and reasonably compensate him for the loss. But, you see, if you allowed him that aggregate sum now, it would be far too excessive. This amount is to be paid at once, and the expectancy of life, as the evidence shows in this case, is about 36 years. His earnings would be from day to day, or from month to month, and from year to year; and he would not be entitled to the aggregate sum. Perhaps a nearer rule—and I do not give it to you, gentlemen, as a controlling rule—would be such a sum of money as, put at six per cent. interest, might earn a sum equivalent to the difference in his wages. To illustrate, if he could have earned $600 a year before the disability,—before the accident,—and that disability now extends to one-half his ability to earn money,—earn wages,—and now, with the injured hand, he is able to earn only $300, say, a sum of money that, at the ordinary rate of interest, would produce him $300 would make him fully whole for the loss. Perhaps this would be too large an amount, because you should take into consideration the contingencies of ill health, the inability to secure work, and other contingencies incident to human life. It is very difficult to give you a rule that would be of much assistance to you; but you should give him such a fair and reasonable amount, if you find him entitled to anything, as you think would fairly compensate him for the injury. In determining this question of damages, you ought to be very careful and very considerate; you ought to be very reasonable."

The court further continued to the jury that in fixing the damages they should not be influenced by the pecuniary circumstances of the parties, or give damages by reason of one man being poor or the other rich, but to deal out fair and reasonable compensation, regardless of the condition of the parties, whether poor or rich, as they were not sitting to dispense charity.

It appeared from the testimony in the case that the plaintiff had the four fingers of his left hand, and his thumb, torn and mangled, so that all the fingers and

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part of his thumb were amputated. There was no question but that the injury was permanent in character.

Counsel for defendants, however, contend that the court was in error in using the illustration of money placed at interest producing a given sum. It is contended, however, that the illustration was used as mere caution to the jury to be reasonable and considerate in fixing the amount, and that the court did not use the illustration as one controlling their judgment; and especially instructed them that perhaps this would be too large an amount, because they should take into consideration the contingencies of ill health, the inability to secure work, and other contingencies incident to human life, and that they were to give him such fair and reasonable amount as would fairly compensate him for the injury.

Counsel for defendants cite the case of *Chicago & Northwestern Railway Co. v. Bayfield*, 37 Mich. 215, as sustaining their position. In that case the illustration was used by Chief Justice COOLEY in delivering the opinion of the Court. The only question then under consideration was the instruction given by the trial judge, that the jury, in estimating damages, should take into consideration whether the family of the deceased were in poor and needy circumstances, and looked to the boy, when alive, for at least partial support; and upon this Chief Justice COOLEY remarked, in speaking of the amount of damages awarded ($3,400), that—

"It is difficult to understand any estimate which would place the loss of the family at such a sum. The annual interest on it, at the customary legal rate for money borrowed, would have been more than three-fourths the whole annual earnings, even supposing Williams to have had steady employment, and to have lost nothing from sickness or other contingencies, and, at the lowest statute rate, it would have been more than half. It seems incred-

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ible that the family could have had reasonable expectation of receiving an annual sum to either amount from such a source; but, if they had, they could, at most, have realized it only for his life-time, while this award of the sum in gross would enable the family to realize the income, not for his life merely, but in perpetuity."

Here the plaintiff was suing for injuries which were permanent, and to continue for a life-time. He was a man in apparent good health, and sound in limb, before the accident. He was a boiler-maker by trade, and capable, as shown by the evidence in the case, of earning large wages.

If, as claimed by defendants' counsel, the jury were influenced by this illustration, and fixed an amount which, placed at interest at 6 per cent., would amount to $300, the deficiency of plaintiff's earning capacity as used by the court in the illustration, yet the other elements of damages, which were proper to be considered, and which the jury must have taken into consideration, are not necessarily included therein. The amount paid for physicians, medical attendance, nurses, and medicine, the physical pain and suffering and mental anguish endured, were all elements to be considered in fixing the amount of the recovery, as well as mere loss of service and his inability to earn wages.

We think, however, that the court was in error in the use of this illustration. If the jury might give an amount which, placed at interest at 6 per cent., would produce the amount representing the loss of his earning capacity, it would be in perpetuity; and this he is not entitled to have. We see no error in the other portions of the charge, as to the measure of damages.

Error is also assigned upon the ruling of the court in permitting plaintiff to testify that soon after the accident he stated his case to Shields & McNamara, attorneys at Alpena, substantially as testified to by him on the wit-

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ness stand. Defendants' counsel, at the time, made no objection to the inquiry, except when the further question was put, as to whether they took down his statement. Defendants' counsel objected to the answer to this question, unless the witness stated which one. Thereupon the court permitted the witness to testify that he made a statement to counsel. This was error. Counsel for the plaintiff contend that this was proper, for the reason that one Luther had been permitted to testify that plaintiff, about that time, told him he did not know how he did it, or how he came to be injured. This testimony would in no sense tend to contradict Luther, and was incompetent.

The sixth assignment of error relates to the ruling of the court in allowing the plaintiff to show that, two or three days after the injury, Mr. McNally, one of the defendants, told John Kinney to tell Dave (plaintiff) that the company would see him through all right, and not to worry, and that that would do him more good than all the medicines, or all the doctors, could do for him. The court was in error in permitting this testimony. It was in no sense a confession or admission of liability on the part of Mr. McNally or the company, and yet the admission of such testimony may have been very prejudicial to the defendants.

Some claim is also made that the court was in error in refusing to give defendants' requests to charge. We think some of the requests state the law correctly, but that they were fully covered by the charge as given. Those referring to the starting of the blower by some of the employés, instead of the defendants, we think, have no force here, and need not be noticed. The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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INDEX.

Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross-references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ABATEMENT.

An assignment of plaintiff's claim for damages in a pending suit, to secure her attorneys for their services, is not a bar to its continued prosecution in plaintiff's name. 681 (1).

See ASSIGNMENT FOR BENEFIT OF CREDITORS (2); BILLS AND NOTES (4).

ABBREVIATION.

The abbreviation, "M. C. R. R.," is the recognized name of the Michigan Central Railroad. 126 (2).

ACCEPTANCE.

An arrangement by the receiver of a corporation to pay its outstanding note in lumber amounts to an acceptance of the note to the common understanding. 842 (1).

See CONTRACT (2); DELIVERY (4).

ACTION—See EXCHANGE OF LAND; PARTIES.

ACTION FOR VALUE OF VOID NOTE—See BILLS AND NOTES (2).

ADVERSE POSSESSION—See EVIDENCE (15).

AFTER-ACQUIRED PROPERTY—See CHATTEL MORTGAGE (1).

ALIENATION—See ESTATES IN LAND.

ANIMALS—See NOTICE.

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APPEAL.

The action of the circuit court in denying an application for leave to appeal from a justice's judgment, under How. Stat. § 7005, on the ground that the appellant was prevented from taking an appeal within the statutory time by causes beyond his control, can only be reviewed on *mandamus*. 815.

ARREST.

1. An arrest, without a warrant, of an alleged prostitute or street-walker by a police officer, who is authorized by ordinance to arrest, upon view, any person found in the act of committing any offense against the laws of the State, on mere suspicion that she is plying her vocation upon the street, no act being committed in his presence indicating that she is there for that purpose, is illegal. 573 (1).
2. The following propositions are summarized from the opinion of Mr. Justice LONG:

a—Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all citizens.

b—One may travel along the public highways or in public places; and while conducting himself or herself in a decent and orderly manner, disturbing no one, and interfering with the rights of no other citizen, there, they will be protected under the law, not only in their persons, but in their safe conduct.

c—The Constitution and the laws are framed for the public good, and the protection of all citizens; and no one may be restrained of his liberty, unless he has transgressed some law.

d—Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees.

e—Suspicion that a party has on a former occasion committed a misdemeanor is no justification for giving him in charge of a constable without a justice's warrant; and there is no distinction, in this respect, between one kind of misdemeanor and another.

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ARREST—Continued.

f—An arrest for misdemeanor, without a warrant, by one who does not see the offense committed, is illegal. *Id.* (2).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where, after a general assignment for the benefit of its creditors by a Michigan corporation, a non-resident creditor, with knowledge of such assignment, attaches property of the debtor in another state, and afterwards files its claim for allowance under the assignment, the value of said attached property should be ascertained and applied in reduction of the claimant's demand. 304 (1).

2. A corporation made a general assignment for the benefit of its creditors. Its indebtedness to its principal creditor was evidenced by its notes, one of which was indorsed by its stockholders. After the assignment, suit was brought upon this note against the maker and indorsers, and the defendants appeared, and under their plea of the general issue claimed to recoup damages growing out of the failure of the plaintiff to furnish to the corporation defendant goods to be sold on commission, as provided in a contract between said parties. The creditor (a corporation) also filed its *entire* claim for allowance under the assignment, and before a hearing discontinued the suit on the note, as to the corporation defendant, and proceeded to judgment against the indorsers. When the claim came on for hearing under the assignment, objection was made to proof of the note, and it was claimed that the amount of the judgment should be deducted from the amount of the claim as presented. And it is held that the controversy over the effect of such discontinuance and judgment could not affect the allowance of said claim, and can only be settled in the suit on the note. 305 (2).

See REPLEVIN (1).

ASSIGNMENT OF PLAINTIFF'S CLAIM—See ABATEMENT.

ATTACHMENT SUIT.

1. A writ of attachment is *mesne* process, and must be returned by the officer, and when so returned remains in the custody of the clerk as a part of the files in the case. The property attached remains in the custody of the officer who served the writ until the suit is disposed of, unless bonded or the attachment is dissolved. 177 (*d*).

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ATTACHMENT SUIT—Continued.

2. If judgment is entered for plaintiff in attachment, execution is to issue thereon to the sheriff or other proper officer of the county, but there is no authority in the law for issuing an execution or other process to a sheriff whose term of office has expired, and whose right to execute process has ceased by the election and qualification of his successor. *Id.* (*e*).

See ASSIGNMENT FOR BENEFIT OF CREDITORS (1); SHERIFFS AND EX-SHERIFFS (1).

ATTORNEY AND CLIENT—See EVIDENCE (14).

ATTORNEY FEE—See MORTGAGE (3); STREET-OPENING CASE (6).

BEASTS—See NOTICE.

BILLS AND NOTES.

1. An agreement made by *one* of three *joint* makers of a promissory note with the payee, by which the payee agrees that two-thirds of the note shall be collected of the *other* makers, and that the remaining one-third shall be paid by the third maker, by applying thereon one-third of the profits arising from running a boat formerly owned by the three makers, and which the payee had bid in at marshal's sale, to which agreement the other two makers were not parties, but who paid two-thirds of the note to the payee, but not in reliance upon said agreement, will be respected and enforced in a suit by the payee against the three makers brought after such agreement and payment, said two makers having been discharged by such payment, and the third maker having the right to pay the remaining one-third according to the new agreement. 50.

2. An *innocent* purchaser of a Bohemian oat note, from whom the holder concealed its true consideration, and to whom he warranted it to be a good note, need not collect it of the maker, though able to do so, but can recover the value of the note, or the money paid for it, from such holder. 145.

3. Where a note is indorsed prior to its delivery, and the indorsers are not the payees, the contract is in form joint against the makers and indorsers. 312 (1).

4. Where a suit is brought against the maker and the indorsers of a promissory note, which indorsements were made prior to the delivery of the note, a discontinuance as to the maker operates as a discontinuance against all of the defendants. 313 (3).

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BILLS AND NOTES—Continued.

5. A bank issued a certificate of deposit, in part payment for a forged draft, to a person giving his name as O. M. Thurston, who indorsed it to the order of A. Conover (he assuming both names), and, in order to have it cashed at another bank, after indorsing it as A. Conover, secured the indorsement of a third party, who acted in good faith and without any knowledge of the fraudulent inception of the paper, as did the bank cashing it. The certificate was protested and the indorser duly notified, who paid it with knowledge of the original fraud, and thereupon brought suit against the bank issuing the certificate, and it is *held:*

a—The certificate was issued to an *actual* person, who gave his name as Thurston, and in the transaction, for all purposes, is known, and can be legally held, under that name, as well as any other he may have or may have assumed.

b—The certificate is not a forgery or issued to a fictitious person, and the plaintiff had the right to make the indorsement he did, being ignorant of the fraudulent inception of the paper, and when he made it he assumed the liability of an indorser of commercial paper; and when the certificate was protested that liability was fixed, which was to the bank cashing the paper, and it became his duty to at once pay it, and, on such payment, the law subrogated him to all of the rights of said bank against the drawers and prior indorsers of the certificate, which he had a right to at once enforce.

c—The *status* of the plaintiff when he made the indorsement, and the equities which *then* controlled and protected his rights, continued until he was fully re-imbursed for the payment so made, unaffected by any after-acquired knowledge concerning the fraud originally practiced. 390, 391.

6. The purchaser of several notes, and of the accompanying mortgage, *one* of which notes is then dishonored, is put upon inquiry as to *all* of the notes, and takes them subject to existing equities, the notes and mortgage being one transaction between the same parties. 415 (1).

See ACCEPTANCE; ASSIGNMENT FOR BENEFIT OF CREDITORS (2); CONSIDERATION (1); CONTRACT (3).

BOARD OF SUPERVISORS—See SHERIFF'S FEES.

BOHEMIAN OAT NOTE—See BILLS AND NOTES (2).

BOND—See PUBLIC BUILDINGS.

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BOUNDARY-STREAM BRIDGES—See BRIDGES.

BRIDGES.

Act No. 62, Laws of 1889, which sought to make provision for boundary-stream bridges, was before the Court in *Township Board v. Supervisors*, 75 Mich. 264, and we found ourselves unable to enforce it, and our attention has not been called to any statute that effectually secures the right to have such a bridge built. 606 (1).

See DRAW-BRIDGE; MANDAMUS; NEGLIGENCE (7).

BUILDING CONTRACT—See CONTRACT (4, 5).

BURDEN OF PROOF—See CERTIFICATE OF ACKNOWLEDGMENT; SALE (1, 3).

CERTIFICATE OF ACKNOWLEDGMENT.

A certificate of acknowledgment carries with it the presumption that the officer making it has certified to the truth, and the party attacking it has the burden of proof to show its falsity. 456 (8).

CERTIFICATE OF DEPOSIT—See BILLS AND NOTES (5).

CHARGE TO JURY—See DAMAGES (3, 5); NEGLIGENCE (6, 9).

CHATTEL MORTGAGE.

1. In this case it is held that a chattel mortgage executed by the principal defendant, and duly filed, to secure existing and future indebtedness, and covering future acquired property, and also all notes and accounts due or to become due the mortgagor, which the mortgagees were authorized to collect, was notice to the plaintiffs, and to all other persons, of the rights of the mortgagees in the property covered by said mortgage; and that under it they are entitled to receive from the garnishee defendant the sum of $600 due the mortgagor on book account, arising largely from the purchase of posts, wood, and ties which were owned by the mortgagor at the time he executed the mortgage, it appearing that the mortgagees intended to retain their lien on said property to secure the payment of the indebtedness secured to them by said mortgage. 36.

2. Plaintiff brought replevin in the circuit court for chattel-mortgaged property, and the writ was delivered to a constable, who removed the property from defendant's store to a building across the street, and, soon afterwards, at the

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CHATTEL MORTGAGE—Continued.

request of the plaintiff, made a formal offer of redelivery of the goods to the defendant, *where stored*, at the same time tendering him the key to the building, which defendant refused to accept, or to have anything to do with the goods unless they were returned to his store. Thereupon the constable delivered the key to a deputy-sheriff, who took possession of the goods under the writ of replevin, which were appraised, and a bond was executed and delivered to the officer signed by sureties only, the penalty of which was less than the appraised value of the goods, after which the goods were delivered to the plaintiff, and were soon afterwards advertised for sale by the officer under the mortgage. On the day fixed for such sale the defendant (mortgagor) paid the full amount due on the mortgage, after which the plaintiff's agent tendered to the defendant the possession of the goods, *where stored*, which defendant declined to accept. Upon an assessment of damages, after a judgment of discontinuance in the replevin suit, the defendant was awarded the value of the property, which judgment is set aside with costs of both courts to the plaintiff; the Court holding that the plaintiff came lawfully into possession of the goods under its mortgage, which possession was not made wrongful by the payment of the mortgage, and that, while the defendant had the right, upon such payment, to a redelivery of the mortgaged property, he could not insist upon its being returned to his store by the plaintiff, but must take it where the plaintiff had stored it for safe-keeping. 86.

COMMENCEMENT OF SUIT—See SERVICE OF DECLARATION (1).

CONCEALMENT OF CAUSE OF ACTION—See STATUTE OF LIMITATIONS (1).

CONSENT DECREE—See INFANTS.

CONSIDERATION.

1. A note given in renewal of one which is paid, so far as lawfully collectible, and which is not supported by any new consideration, is void for want of consideration. 124 (2).
2. The purchase of property of a wife, at the request of her husband, upon the condition that the husband would sign a release of all of his claims against the vendee, is a sufficient consideration for such release. 843 (5).

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CONSIDERATION—Continued.

8. Where, in such a case, the husband was induced to execute such release by fraudulent representations that it was not binding, and would not be used against him, and his wife receives the entire benefits of the transaction, the husband is not estopped from repudiating the release for fraud because of the non-return of such benefits by the wife. *Id.* (6).

CONSTITUTIONAL LAW.

1. Act No. 264, Laws of 1887, providing for the recovery of damages for injuries sustained by reason of defective highways, etc., is constitutional. 209 (1).
2. Act No. 468, Local Acts of 1889, relative to the registration of voters, etc., in the city of Detroit, is unreasonable and void, in that it undertakes to disfranchise a large number of voters, through no fault of their own, and to make an unjust and unlawful discrimination between the rights of native-born and naturalized citizens and electors. 545 (1).

See ARREST (2).

CONSTRUCTION OF CONTRACT — See CONTRACT (2); DRAWBRIDGE.

CONSTRUCTION OF DEED—See DEED; DEED OF WATER-POWER.

CONTRACT.

1. An unsecured agreement from a son for the life support of his father, in exchange for property of which the father denudes himself, is unconscionable, unless very evidently safe. 18 (*d*).
2. Plaintiff made a written proposition to furnish defendant a fire-alarm bell, etc., in which it was stipulated that defendant should thoroughly test the working of the same within 30 days after the completion of the work, and, if found to be satisfactory, and according to contract, accept and pay for the same. A contract was thereafter made between the parties, of which the proposition was made a part, which provided that the defendant should have 30 days after the completion of the contract to test the bell and the working apparatus, and in case the same was satisfactory, as per contract, should pay for the same. The work was performed, and tested, and rejected by the defendant's common council, and in a suit upon the contract to recover the contract price it is held that the provision in the contract as

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CONTRACT—Continued.
to testing the work does not change the import of the like clause in the proposition, but that they must be construed together, and that their reasonable construction is that the defendant was not obliged to accept and pay for said fire-alarm unless it was satisfactory to its common council, when tested. 67.

3. In this case it is held that the agreement made by the telegrams to accept notes held by defendant Randall, and discontinue the suit, has all the essential elements of a valid contract, upon which an action might have been maintained by the plaintiff upon a refusal by Randall to deliver the notes; that such new contract was not collateral to the original contract of indebtedness sued upon, giving to Randall merely a claim for damages in case of its breach, but that it operated directly upon such original contract, and could be pleaded in bar of the same. 195 (1).

4. Where, on the failure of a contractor to perform a building contract, the other party has a right to take possession of and complete the building, he is entitled to set off from the contract price all necessary and reasonable expenses incurred in its completion, and in a suit by the contractor he is entitled to an instruction to that effect to the jury. 261 (4).

5. Where a contractor had furnished certain material made especially for the building he had contracted to erect, which was unsuitable elsewhere, and the other party, on taking possession of and completing the building on the default of the contractor to complete it by the time specified in the contract, refused to receive such material, he is liable for its diminished value. *Id.* (5).

6. Plaintiff transferred to defendant certain land warrants, at $20 per acre, and agreed to use his whole influence and legal ability in securing the location of certain lands thereunder, the application for such entries being contested in the General Land Office, at Washington. In consideration of such services, if successful, he was to receive a deed of an undivided one-eighth interest in the lands when patented to defendant, and if unsuccessful was to receive back the warrants sold defendant, if he so elected, at the same price he sold them for. The contract further provided that a failure to secure patents for the lands should estop plaintiff from demanding compensation for his services in trying to procure such patents.

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CONTRACT—Continued.

The applications were rejected in April, 1886, and in December, 1886, the defendant sold the warrants at $55 per acre. In July, 1887, plaintiff made a formal demand for the warrants, and a tender of the $20 per acre was waived, and the demand refused, whereupon plaintiff brought suit upon the contract, counting upon the failure of the defendant to return the warrants, at $20 per acre, and recovered a judgment for $35 per acre, the trial court holding the contract *divisible*, and that the delay of the plaintiff to make an election under the contract to receive the scrip was excused by the action of the defendant in disposing of the warrants. In reversing the judgment the Court hold:

a—The contract must be construed as a whole, and the services of the plaintiff in procuring the location of the land were a condition precedent to the return of the warrants.

b—The title to the warrants passed to the defendant when he made his purchase, and his contract for a resale is executory; and when a promise rests upon two things to be performed for its consideration, and the promisee desires to enforce it, he can only do so after such performance.

c—From the facts disclosed in the testimony, there was a question as to what services plaintiff rendered for the defendant before the land department that should have been submitted to the jury.

d—Assuming the Commissioner of the Land Office to be the highest authority having jurisdiction in the matter, the plaintiff should have made his election *at once*, and notified the defendant; and a fair construction of the contract required such election and notice to have been made and given within a very few days, at most, after the decision of the Commissioner.

e—It was of no consequence what defendant had done with the warrants; he should have had an opportunity to have returned them, or to have replaced them with other like scrip. 377, 378.

See DRAW-BRIDGE; EQUITY.

CONTRACT TO PAY TAXES—See MORTGAGE (5).

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE (3, 9–11).

COSTS.

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COSTS—Continued.

1. Where, in a suit in the circuit court for damages for obstructing a highway, the only matter in issue by the proofs is whether or not the particular spot where the obstruction was placed was in the public highway as constituted by user, which question is determined in favor of the plaintiff, he is entitled to costs under How. Stat. § 8964, although the judgment is less than $100. 169 (2).
2. In this case it is held that the plaintiff established a claim exceeding $100, which was reduced by set-off, and that he is entitled to costs. 216.

See DAMAGES (2).

CREDITOR'S BILL—See JUDGMENT CREDITOR'S BILL.

CRIMINAL LAW—See ARREST; HIGHWAYS (10).

CROSS-BILL—See DOWER (*a*).

CUSTODIAN'S FEES—See SHERIFFS AND EX-SHERIFFS (2).

DAMAGES.

1. In a suit to recover damages for negligent injury to a horse, which rendered the animal *entirely worthless*, the plaintiff may recover, in addition to the value of the horse, the amount paid for medical treatment, in *good faith*, and upon a reasonable belief that the horse could be cured or made of some value if properly taken care of, which are questions for the jury; but such recovery must be confined within reasonable bounds, and can never exceed in amount the value of the animal. 150.
2. The taxable costs awarded to a party in a suit to remove a cloud upon his title caused by the insertion in a deed of a statement that he had fraudulently obtained possession of the land, which he pretends to own, etc., are not the measure of his damages in a suit for defamation of title, but he may recover as damages any other reasonable outlay incurred in removing such cloud,—it appearing that the defendants acted maliciously, and under a claim which they knew to be false, for the purpose of harassing the plaintiff and thereby forcing a settlement. 472 (3).
3. Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them

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DAMAGES—Continued.
in reaching a conclusion, the amount of damages awarded is beyond the reach of a writ of error. 514 (5).
4. The "fair and just damages" which the jury are authorized to assess against a railroad company, in a suit under How. Stat. § 3392, must have reference to the *pecuniary* injury resulting from the death which is the basis of the action. 530.
5. In a negligence case, where the injury was permanent in its character, the court, in charging the jury on the question of damages, used the following language, in substance: "Perhaps a nearer rule—and I do not give it to you as a controlling rule—would be such a sum of money as, put at six per cent. interest, might earn a sum equivalent to the difference in plaintiff's wages before and after the accident. To illustrate, if he could have earned $600 a year before, and can now only earn $300, a sum of money that, at the ordinary rate of interest, would produce $300 per year would fully compensate him for his loss. Perhaps this would be too large an amount, because you should take into consideration the contingencies of ill health, the inability to secure work, and other contingencies incident to human life." The court is held to have erred in using the illustration, for if the jury might give an amount which, thus placed at interest, would produce the amount representing the loss in plaintiff's earning capacity, it would be a perpetuity, which he is not entitled to have. 688 (2).

See EVIDENCE (17); HOMESTEAD; LANDLORD AND TENANT.

DECLARATION—See SERVICE OF DECLARATION.

DEED.

1. A survey referred to in a deed for greater certainty forms a part of it, and both should be construed together. 121 (1).
2. A deed cannot be made worse by the introduction of testimony conforming to it, and, even if such secondary evidence is incompetent, the party objecting to it cannot complain of an immaterial error. *Id.* (2).
3. This case involves the construction of a deed of a right of flowage, and it is held that the marks on certain trees mentioned in the deed were established as points or levels from which to measure *downward*, the number of inches specified, to the point or line beyond which the water could not be raised. *Id.* (3).

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DEED—Continued.

See DELIVERY (2); CERTIFICATE OF ACKNOWLEDGMENT; EXCHANGE OF LAND.

DEED OF RIGHT OF WAY—See RAILROAD COMPANIES.

DEED OF WATER-POWER.

The owner of a water-power and adjacent lands conveyed a site for a factory, and also an undivided one-eighth of the land flowed and subject to flowage. The deed further provided that if the undivided one-eighth of the water-power *which was intended to be conveyed* did not amount to 225 inches of water the grantee should have the right to use enough water from the pond to make up that amount, subject to the reservation by the grantor of the *first* use of a sufficient amount of water properly used to drive certain specified stones and machinery in his grist-mill,—the grantee to have the *next* use of the water to the amount specified in the grant. The deed further provided that in case of any break in the dam, or necessary repairs thereto, the grantor should pay seven-eighths, and the grantee one-eighth, of the expense, except such repairs as were needed in the separate races and appurtenances of each property, which were to be made by the owners. The grantor reserved the right to raise the dam two feet. In a suit against claimants under the grantee for an alleged improper use of water under the grant, the deed is construed as follows:

a—To convey absolutely one-eighth of all the land flowed, or subject to flowage, including the water on such land.

b—Under said deed the grantor parted *absolutely* with one-eighth of his water-power, and, if the same did not amount to 225 inches of water, the grantee was entitled to the use of enough of the remaining seven-eighths to make up the deficiency, provided the grantor could spare it without interfering with the use of his grist-mill, as specified in the deed.

c—The reservation of enough water to operate the grantor's grist-mill referred to the seven-eighths of the water-power not conveyed by the deed. 438.

DEFAMATION OF TITLE—See DAMAGES (2); EVIDENCE (18).

DEFICIENCY ON FORECLOSURE SALE—See MORTGAGE (13, 14).

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DELIVERY.

1. Where a mortgage is executed in the absence of the mortgagee, and placed upon record by the mortgagor, and permitted to remain of record as a mortgage, and assumed to be such by all of the parties in interest, want of a manual delivery is of no importance. Such recording, in the absence of evidence to the contrary, is presumptively a delivery. 234 (1).
2. Especially is the recording of a deed considered presumptively a delivery of it, as between the grantor and grantee, when the object of the record is to defraud, hinder, or delay creditors. *Id.* (2).
3. In this case the defendant is held estopped from claiming that two mortgages executed by him for the purpose of preventing the collection of claims by creditors were void for want of consideration and delivery, the same having been recorded, and foreclosed after the death of the mortgagee by his personal representative, who bid in the land for the estate, and thereafter caused it to be sold at administrator's sale to the plaintiff, an innocent purchaser, who brought ejectment against the mortgagor, who had remained in possession of the premises, and who sought to defeat a recovery on the grounds stated. *Id.* (3).
4. Where a grantee accepts a deed without its being executed by the wife of the grantor, upon her agreement to afterwards execute it, which she does, he cannot be heard to say that the deed was never delivered to or accepted by him because of his refusal to again receive it after such execution by the wife, whose only interest in the land is an *inchoate* right of dower. 456 (5).

See MORTGAGE (9); PRINCIPAL AND AGENT (4).

DELIVERY OF MORTGAGED PROPERTY—See CHATTEL MORTGAGE (2).

DIRECTING VERDICT.

Directing a verdict for the defendant in a replevin suit before either of the parties has rested, and while the case was in the hands of the defense, and the plaintiffs stated that they desired to offer further testimony, among which was the appraisal of the property, is error, calling for a reversal. 26.

DISCONTINUANCE—See ASSIGNMENT FOR BENEFIT OF CREDITORS (2).

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DOWER.

A father conveyed two parcels of land—one his homestead—to his son, the mother not joining in the deed, and remaining in possession of the homestead until the death of the son, who left a widow and minor children surviving him. After the appointment of an administrator of the son's estate, a second son filed a bill against his mother, the administrator, and the said widow and minor children, to set aside said deed for fraud and other causes, and praying partition of both parcels; in which bill he recognized and asserted the dower interest of his mother, who was in sympathy with him in the suit, although a nominal defendant, and who filed a cross-bill against the complainant and her co-defendants asking assignment and partition of dower on one parcel of said land, and a life-estate in the homestead forty acres, and damages for her past dower since her husband's death, which occurred some years prior to that of her son. The administrator, and the son's widow and heirs, answered the cross-bill, and admitted the mother's right to dower, unless barred by statutory limitation, and also claimed the benefit of a demurrer. At the close of the litigation a consent decree was made fixing a certain sum as due the mother for dower, which the administrator paid, and which was allowed to him on the settlement of his final account, from which an appeal was taken and said allowance affirmed; and in reviewing said decision the following propositions are stated:

a—The cross-bill of the mother was not called for by anything in the original bill, and was unnecessary so far as the land was concerned. Her claim for arrears of dower, if valid at all, was one against the administrator, and did not concern the heirs, except through him. Her husband's death extinguished the homestead right sought to be asserted, if it had existed, and there was no occasion to go into equity for her dower in any of the land.

b—If the mother had any claim for arrearages against the intestate (her son) when he died, it should have been established separately as a claim against his estate. It could not properly be mixed up with any claim against his heirs after his death, which could only be made out by proceedings in ejectment as damages for withholding the possession after the right of dower was determined.

c—The claim for dower paid to the mother by the adminis-

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DOWER—Continued.
trator is disallowed, and the decree otherwise affirmed. 109, 110.

DRAW-BRIDGE.
This case involves the construction of a contract by which a railroad company agreed to keep in repair the road-bed or roadway across the draw in a draw-bridge used by it, and a bridge company agreed to keep in repair the highway or roadway across said draw-bridge used exclusively by it, and it was mutually agreed that all other portions of said draw-bridge, its piers and abutments, should be maintained in common by both of the parties; and it is held that the wheels supporting the draw, upon which it rested and turned, were manifestly included with the "*other portions of the draw-bridge*," mentioned in the contract. 426

EARNING CAPACITY—See DAMAGES (5).

EJECTMENT.
1. The record in actions of ejectment is much more important under our statute than it was at common law, where ejectment was merely a possessory action. Under the statute it is used to determine *title* as well as possession, and the statutory requirements should be observed. 570 (1).
2. The verdict in ejectment must follow the declaration as to the description of the premises, and the extent and quality of the estate claimed. *Id.* (2).
3. Where a plaintiff establishes his title to only an undivided one-half of the land described in his declaration, and the defendant is in peaceable possession, and is not an intruder, judgment should be rendered accordingly, and the declaration may be amended to correspond with the right established at the trial. *Id.* (3).

See DOWER (*b*).

ENCROACHMENTS—See HIGHWAYS (3).

ELECTIONS.
1. The following propositions are summarized from the opinion of Mr. Justice MORSE:

a—The Constitution authorizes the Legislature to enact laws "to preserve the purity of elections, and to guard against abuses of the elective franchise;" but this does not authorize, by direction or indirection, the disfranchisement,

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ELECTIONS—Continued.
without his own fault or negligence, of any elector under the Constitution.

b—The laws to regulate elections, and to preserve their purity, and to guard against abuses to the elective franchise, must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather that to subvert and impede, the exercise of the right to vote. *Capen v. Foster*, 12 Pick. 488.

c—There is no good reason why the boards of registration cannot sit within the ten days before election necessary to gain a *voting* residence, and thereby preserve to each elector his constitutional right; and the constitutional term of such residence cannot be increased under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will.

d—A registration law is unreasonable which contains no provision by which an elector who is sick on the days fixed for registration can vote on election day.

e—The object of a registry law, or of any law to preserve the purity of the ballot-box, and to guard against abuses to the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege.

f—In order to prevent frand at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. The power of the Legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction.

g—Requirements which compel a naturalized elector to produce his certificate, or show by evidence other than his own oath that such a certificate was issued, make an unfair and unnecessary distinction between native-born and naturalized electors.

h—No registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply.

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ELECTIONS—Continued.

i—No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. 545, 546 (2).

2. In this country it is generally understood that, in the absence of any statutory provision expressly requiring more, a plurality of the votes cast will elect. 635 (1).
3. When the law requires certain officers to be elected by ballot, there is and can be no such thing as an "informal" ballot. *Id.* (2).
4. All ballots cast under statutory requirements are formal and final, if there is an election, and cannot be repeated. *Id.* (3).
5. On the election of a school examiner by the board of school inspectors, the result of the ballot expresses that fact, and there is no necessity of declaring him elected. *Id.* (4).
6. It is only *elected* officers who hold until their successors are elected and qualified. *Id.* (5).
7. A school examiner *appointed* to fill a vacancy can only serve out the unexpired term. *Id.* (6).

See CONSTITUTIONAL LAW (2).

EQUITY.

A father, at the urgent request of his wife and son, conveyed his homestead to his son, who executed to his father and mother a life lease of the property. The expressed consideration in the deed was $500, and the estimated value of the property was from $3,000 to $5,000. The lease was kept by the mother, and practically out of the father's control. Afterwards, the father was induced to consent to the conveyance by the son to his mother of the south half of the premises, on the understanding that she was to deed to him half of a lot she owned, which she failed to do, and afterwards conveyed it to her son, and conveyed the south half of the other lot to a daughter, who gave her back a life lease in her individual right. Domestic troubles increased after this, if they did not substantially begin, and the father commenced litigation to recover his property, which led to a so-called settlement by which he released all of his interest in the north half of the lot to his son, receiving $400 in cash and an agreement from the son to support him comfortably in his home during his natural life, or, at the father's option, to secure for him a home at a hospital in the city for life.

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ELECTIONS—Continued.

This agreement provided for $1,000 stipulated damages, if not performed, but was unsecured. At this time complainant executed quitclaim deeds to his son and daughter of all his interest in the premises originally deeded to his son. He was refused admission at the hospital, and filed a bill to secure a reconveyance of the property, and for an accounting for rents and profits; and he is held entitled to a reconveyance, from the son and daughter and mother, of the north half of the lot originally deeded to the son, or, if they prefer, to the sum of $1,500, adequately secured, and payable in installments. 17 (1).

See HIGHWAYS (11, 12c).

EQUITY JURISDICTION—See MORTGAGE (15).

EQUITY PRACTICE.

A bill cannot be filed to take into a court of chancery jurisdiction over a controversy of a legal nature without a verification of such facts as show its propriety. 642 *(f)*.

See INFANTS; JUDGMENT CREDITOR'S BILL (1-4); MORTGAGE (11); TAXES (4).

EQUITABLE SET-OFF—See MORTGAGE (7, 8).

ERROR—See APPEAL.

ESTATES IN LAND.

William Case leased to his son, Hiram S. Case, and to his son's wife, Rebecca Ann Case, a parcel of land for their lives, and, after their death, their son Adelbert Case was to have a like estate in the land; both estates being created by the same instrument. William Case died leaving a daughter, Jennie B. Rice, and the said Hiram S. Case as his sole heirs. The daughter conveyed her interest in the land to her brother, who went into possession, and conveyed the land to Norman C. Green, who succeeded to such possession. After the death of his father, Adelbert Case conveyed his life-estate under the lease from his grandfather to the plaintiffs, who had secured a quitclaim deed from Rebecca Case, and who, during the life-time of Adelbert Case, brought ejectment to obtain possession of said land from said Norman C. Green and another, who defended on the ground that the lease to Adelbert Case was invalid because the absolute power of alienation was suspended for a longer period than during the continuance of

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ESTATES IN LAND—Continued.

two lives in being at the creation of the estate; and in passing upon said claim the Court hold:

a—The estate of Adelbert Case was an expectant estate, and was created when the grant was delivered to Hiram S. and Rebecca Case, at which time the instrument became operative. How. Stat. § 5557.

b—Adelbert's estate was a future estate, being dependent upon the precedent estate of Hiram S. and Rebecca Case. It was what is termed a "remainder," and might be transferred by that name. How. Stat. § 5527.

c—Adelbert being alive, and having the immediate right to the possession of the land upon the ceasing of the intermediate or precedent estate, it was a vested estate in him at the time of its creation (How. Stat. § 5529); and, being a vested expectant estate in him, it was descendible, devisable, and alienable in the same manner as estates in possession. How. Stat. § 5551.

d—It follows that William Case, the owner of the fee, Hiram S. and Rebecca Case, the owners of the life-estate in possession, and Adelbert, the owner of the remainder, could by uniting in a deed, or by separate deeds, convey an absolute fee in possession, and, upon the death of William Case, the survivors, with Jennie B. Rice, could have done so, and, after she conveyed to Hiram S., he and Adelbert could have done so. Hence there has been no time but what there were persons in being by whom an absolute fee in possession could be conveyed, and consequently the instrument is not a restraint upon the absolute power of alienation, or prohibited by How. Stat. §§ 5530, 5531.

e—As no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise, there is no reason why the present suit may not be maintained. How. Stat. § 5548. 540, 541.

ESTATES OF DECEASED PERSONS.

The statutory authority to sell lands under license of courts of probate is a special power, and confined to the case where the sale covers, so far as the land sold is concerned, the interest of which the decedent died seized. 186 (1).

See ESTATES IN LAND; DOWER.

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ESTOPPEL

Where a mill-owner complained of the inspection of certain cargoes of lumber shipped to the vendees as fraudulent, and accompanied the complaint with the statements of the inspectors, and received and discounted the vendees' notes for the amount shown by the statements, he waived no claim for the lumber fraudulently obtained, if any, through such inspection, having received no more than his own for the lumber which the vendees had confessedly received. 158 (2).

See CONSIDERATION (3); DELIVERY (3, 4).

EVIDENCE.

1. The fact that a plaintiff, in a slander suit, calls the defendant as a witness, who denies any knowledge of the alleged slanderous statements or of their publication, will not, of itself, prevent the plaintiff from proving his case by other witnesses or circumstances, nor will the jury be debarred from drawing the natural and necessary inferences, from facts proven by such other testimony and circumstances, outweighing the positive statements of the defendant. 1 (8).
2. In cases involving family transactions, where the testimony of the parties is conflicting, circumstances are important factors in getting at the truth. 18 (*a*).
3. The absence of past-due coupons is some indication that a coupon-bond is not in default. 126 (3).
4. Plaintiff, a mill-owner, contracted with defendants Holland & Stewart for the sale of 1,700,000 feet of lumber, to be inspected by their co-defendants, and brought suit against *all* of said defendants, claiming a conspiracy on their part to defraud him in the inspection of said lumber, and it is held that the testimony introduced by the plaintiff to show such fraud was competent, and upon its face made out a *prima facie* showing. 158 (1).
5. A plaintiff may state the contents of a receipt presented to him by the defendant, for a certain sum in full of all claims, which plaintiff refused to sign, and returned to the defendant, without producing the paper or giving notice to the defendant to produce it. 318 (2).
6. The main question in this case is held to be whether there was any evidence to go to the jury tending to show fraud in obtaining the contract or the receipt referred to in the opinion, which question is decided in the affirmative. 386.

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EVIDENCE—Continued.

7. The evidence of a boot and shoe dealer who was present when a stock of boots and shoes was inventoried by attaching creditors, and set down the amount of the appraisement as given to him by the appraisers, but who did not look over the goods to any extent, but noticed that they were in fair condition and comparatively new, but did not make sufficient examination to give an opinion as to the *exact* value of the goods, is admissible, and the weight to be given to it is for the jury. 337 (1).

8. Evidence of what property brought at auction is admissible as having some tendency to prove value. *Id.* (2).

9. One who impugns a transaction as fraudulent which may or may not be so is not sustained by his own assertion alone in case he is disputed, but must make his allegation good by independent evidence. *Id.* (3).

10. Where, in a suit for damages for alleged fraudulent representations by which plaintiff was induced to purchase a note, the jury find that the fraud was committed as claimed, evidence that the defendant said he would guarantee that the note would be paid is admissible as a part of the transaction, if the jury find that such promise was made to aid in the fraud perpetrated on the plaintiff. 342 (3).

11. It is always proper to show the relation which a witness bears to the party litigant, and also what interest he has exhibited in the prosecution or defense of the suit, and what part he has taken, if any, as affecting his credibility before the jury. 431 (1).

12. Where an expert witness based his testimony that certain samples of milk furnished him contained a larger per cent. of water, and a smaller per cent. of fat, than they ought, if unadulterated, upon comparisons and tests made of other samples of milk, he may be examined on cross-examination as to the results of such comparisons and tests. 432 (2).

13. Where the fact that negotiations were pending for an exchange of land is not disputed, but the contention of the defendant, who is sued for refusing to execute a deed of his land, is that the delivery of a deed which the plaintiffs claim was made absolutely pursuant to such negotiations, at a meeting of the parties at a given date, was conditional upon the approval by defendant's attorney of the abstract of title to said land to be by him thereafter examined, what

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EVIDENCE—Continued.

had taken place before said meeting of the parties is immaterial and irrelevant upon the issue of such delivery, unless the defendant can be shown to have said or done something before going to the place of meeting indicating an intention to accept said deed without such investigation of title. 455 (1).

14. The testimony of a conveyancer who acted for *all* of the parties in preparing deeds and other papers on a proposed exchange of land, as to what transpired while the papers were being drafted, is not privileged by reason of his being also the attorney for one of said parties. *Id.* (2).

15. The adverse possession of land by a patentee and those claiming under him for fifty years renders evidence of the non-record of the patent irrelevant in a suit involving the title to the land. 455 (4).

16. Where in a railroad negligence case the defendant claims contributory negligence of the fellow-servant of the deceased in running the trains in violation of the rules of the company as to speed, testimony is admissible on the part of the plaintiff tending to show that a strict compliance with the rules was impracticable, and that they were obeyed as nearly as possible and run the trains on the schedule time fixed by the company. 514 (3).

17. Evidence of the pecuniary means of the husband at time of his death is inadmissible in a suit to recover damages for the loss sustained by such death, alleged to have been caused by the negligence of the defendant. 514 (6).

18. In a suit for defamation of title by the execution of a deed containing a statement that the plaintiff had fraudulently and without consideration obtained possession of the land described in the deed, and that he pretends to own it, etc., which statement is found to have been malicious and upon no foundation of right whatever, plaintiff should be allowed to make full proof of the acts and conduct of all of the defendants,—they having all participated and actively engaged in the execution and delivery of the deed,—in their continued claim of title under the deed and the recital therein, not only to show their continued claim of pretended rights in the premises, but also their motive in inserting the recital in the deed, and in their pretended claims thereunder. 472 (2).

19. Plaintiff sued defendant for injuries received in alighting

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EVIDENCE—Continued.

from one of its cars while in motion, and was allowed to testify, as showing her reason for so doing, that on a former occasion the car on which she had taken passage left the main line before reaching her destination, and was driven into defendant's barn, where on leaving it she was insulted by a man in said barn; and that on the occasion of the accident the car again started for the barn, when she rang the bell, but the signal was disregarded, and for fear of a repetition of her former experience she left the car and was injured, and said testimony is held to have been competent and relevant. 587 (2).

20. In such a case the question whether the treatment the plaintiff received at defendant's barn was sufficient to justify her belief that she was avoiding an actually impending danger, into which she was being taken, by leaving the car, is a question for the jury, and not for the court. *Id.* (3).

21. A physician who is called to treat a person for an injury, when sworn as a witness in a suit to recover damages for the same, may state how the patient described the pain from which she was suffering, and may describe the patient's actions, as tending to inform the jury of the patient's condition. *Id.* (4).

22. Where in a negligence case a witness for the defendant testified that plaintiff told him that he did not know how he came to be injured, it is error to allow the plaintiff to testify, on rebuttal, that at about the time of the alleged statement he stated his case fully to his attorneys, and substantially as testified to upon the trial, in which testimony he explained fully how the accident happened. 688 (3).

23. A statement by an employer, soon after an accident to an employé, "that he would see him through all right, and not to worry," is in no sense a confession or admission of liability, and evidence of the making of the same is inadmissible in a suit for damages by the employé. *Id.* (4).

See MORTALITY TABLES; SALE.

EVIDENCES OF TITLE—See TITLE TO LAND.

EXCESSIVE DAMAGES—See DAMAGES (3).

EXCHANGE OF LAND.

Where under an agreement for an exchange of land one party executes and delivers the requisite deed, and the agreement as to a conveyance by the other party is void, and he refuses

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EXCHANGE OF LAND—Continued.
to perform it, such refusal has the effect to rescind the contract and raise an implied promise to pay for what he has received upon it. 456 (6).

EXECUTION—See ATTACHMENT SUIT (2).

EXECUTORS AND ADMINISTRATORS—See DOWER.

EXPERT WITNESS—See EVIDENCE (12).

EX-SHERIFF—See SHERIFFS AND EX-SHERIFFS.

"FAIR AND JUST DAMAGES"—See DAMAGES (4).

FEES—See SHERIFF'S FEES.

FELLOW-SERVANTS.
1. A founder in a blast furnace for the manufacture of pig-iron, who has a separate department,—the inside work of the furnace,—and who has nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, is held to be a fellow-servant of an engineer whose business it is to move the cars on the furnace track as desired in the business, and to assume the risk that said cars might be handled negligently by said engineer. 272 (6).
2. A train dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a "fellow-servant" with other employés acting under his orders. 513 (1).

FIRE-ALARM—See CONTRACT (2).

FIRE INSURANCE
1. Where, at the time of issuing a policy of insurance, the insured was in possession of the insured premises (a homestead) under a deed in which the land was incorrectly described, but was correctly described in the policy, which mistake was not discovered until after a loss had occurred, when it was at once corrected by the execution of a quit-claim deed by the original grantor to the insured, such mistake cannot work a forfeiture of the policy, under a clause avoiding it if the interest of the insured is other or less than a perfect legal and equitable title and ownership; the title to the premises being substantially as represented, as in equity the insured had the right to the legal title as she then had

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FIRE INSURANCE—Continued.
the equitable title, and when it was so conveyed it related back to the time of taking possession under the deed containing the wrong description. 141.

2. The intent of the parties to an insurance policy in respect to occupancy is to be gathered from the usual and ordinary use of the premises for the purposes to which they are devoted. 565 (1).

3. Where at the time of insuring a farm barn it was occupied by a tenant, who lived on another farm, and used the barn for the storage of produce until sold, of which facts the agent of the company had notice,—the application being a verbal one, and the policy being silent as to occupancy,—the cessation of *such* occupancy by the tenant, after which an agent of the owner of the barn went to the premises frequently to see that the doors were fastened, etc., will not avoid the policy upon the ground that when the policy was issued the premises were occupied in the usual manner by a tenant, and that they became vacant and unoccupied within the meaning of the policy on the cessation of such occupancy. *Id.* (2).

FLOWAGE—See DEED; DEED OF WATER-POWER.

FORCIBLE ENTRY AND DETAINER.

How. Stat. § 8295 (subd. 3), giving a summary remedy for securing the possession of premises sold by virtue of any mortgage or execution, applies, by its terms, only to redeemable foreclosures, and cannot cover chancery sales without enlarging it beyond its terms, and interfering with the legitimate powers of courts of equity. 115.

FORECLOSURE—See MORTGAGE.

FORGERY—See BILLS AND NOTES (5).

FRAUD—See CONSIDERATION (3); JUDGMENT CREDITOR'S BILL; EQUITY; ESTOPPEL.

FRAUDULENT REPRESENTATIONS.

1. If a bond is represented as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and if it is purchased honestly on such a recommendation, it is a fraud to so transfer it, if such representation is false. 126 (4).

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FRAUDULENT REPRESENTATIONS—Continued.

2. To hold that a man cannot be defrauded by false representations because he is presumed to know the law, which presumption is a violent one in most cases, is to place the ignorant and foolish, who are generally the victims of fraud, beyond the protection of the law. 342 (2).

FRAUDULENT SALE—See SALE.

FUTURE-ACQUIRED PROPERTY—See CHATTEL MORTGAGE (1).

FUTURE INDEBTEDNESS—See CHATTEL MORTGAGE (1).

GUARDIAN AND WARD.

1. Ordinarily the parent is entitled to the services of a minor child, but is also liable for its support and maintenance. These services and this support are considered as reciprocal, and there is no justice in allowing the parent (who is also guardian) a yearly sum for the care and support of the child, while at the same time in receipt of the child's services while at home, or its wages while working away from home. 330 (1).

2. In this case a guardian is allowed $25 per year for twelve and one-half years, for clothing, and making of same, for a child who was seven years of age when taken by the guardian, as a just remuneration in the absence of any itemized account of such expenditures. *Id.* (2).

HIGHWAYS.

1. The statute making it the duty of cities to keep in reasonable repair all public streets open to public travel within their jurisdiction, and under their care and control, applies to defects in construction as well as to neglect to repair when the street is unsafe (*Carver v. Plank-road Co.*, 61 Mich. 590); and the safety required by the statute is secured to travelers as well by night as by day, and the dangers surrounding them in the darkness of the night are conditions that should be taken into consideration by the authorities whose duty it is to construct and keep in repair the roadway. 165 (1).

2. It is the roadway that the statute requires to be kept in a reasonably safe condition; and whether such way requires the use of the entire width of the street must depend entirely upon the necessities of travel in any given case, and of this the authorities of a township or city must take notice, at their peril. 166 (2).

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HIGHWAYS—Continued.

8. The proviso in How. Stat. § 6815, that justices of the peace may have jurisdiction in actions for damages resulting from obstructions to highways, confers, at best, only a *concurrent* jurisdiction with the circuit court. 168 (1).

4. Act No. 264, Laws of 1887, providing for the recovery of damages for injuries sustained by reason of defective highways, etc., is constitutional. 209 (1).

5. A declaration under said act avering that the accident occurred upon one of the principal streets of a city, by reason of a defective sidewalk, which defect was a dangerous one, and had existed for three months, and that the defendant then and there knew that the sidewalk was unsafe, and not fit for travel, sufficiently states knowledge or notice of the defect by the defendant. *Id.* (2).

6. In such case it is error to permit the plaintiff to show the bad and defective condition of the walk at other places beyond the defect which caused the injury. *Id.* (3).

7. Public user alone, when sufficiently general and long continued, will constitute an acceptance of a country road. 271 (3).

8. Where a corporation has for over 20 years maintained a road across its property, which has been used by the public as a connecting link in a road between two towns, and has laid railroad tracks across said road upon its property, and permitted the public to use the crossing, which it has planked, without any dissent, it is estopped from denying that, so far as said crossing is concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and is bound to use due care and diligence in running its trains over said crossing to prevent injury to passengers lawfully on the road. 272 (4).

9. The first clause of section 4 of Act No. 264, Laws of 1887, which provides a remedy for the failure of townships to keep highways in repair, limits the right to bring suit under the first and second sections of the act, for personal injury and injury to property, to public highways which have been in use for *ten* years. 486 (4).

10. The duty imposed upon townships by section 3 of Act No. 264, Laws of 1887, to keep their highways in reasonable repair, etc., may be enforced by information or indictment where the highway has *not* been used as a public highway

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HIGHWAYS—Continued.
for *ten* years, but a personal action for damages will not lie in such cases. *Id.* (5).

11. Chapter 6 of Act No. 243, Laws of 1881 (How. Stat. §§ 1873–1876), furnishes not only an adequate remedy at law for the removal of encroachments upon *township* highways, but one devised for the very purpose, and made obligatory in terms, and leaves no occasion for resort to equity, unless under some possibly peculiar circumstances which cannot generally exist. 641 (1).

12. The following general propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—The highway law now in force was passed in 1881, and supplied methods for dealing with encroachments which had been previously wanting or were very imperfect. The former laws made no provision for dealing with encroachments except where the highway had been duly laid out according to law. Highways by user, or those in any way lacking complete regularity, were left without statutory redress.

b—The proceedings in case of regularly laid out highways consisted of a species of inquest not in the ordinary course of law; and it was held by this Court that titles and boundaries actually disputed could not be subjected to any remedy which would deprive a party of his right to a trial after the course of the common law.

c—The amendment to Comp. Laws 1871, section 5057 (How. Stat. § 6611), empowering courts in chancery to hear and determine all cases of encroachments upon the public highways, streets, and public alleys in organized townships and incorporated villages and cities, being merely an amendment of a general section in the chapter on courts of chancery, left the section, as before, to be construed with the rest of the statute, and subject to its provisions, as far as practicable.

d—How. Stat. § 1871, authorizes the highway commissioner, in case of encroachment upon a township highway, to order its removal, which order must specify the width of the road, the greatest extent of the encroachment, and of what it consists, and the place or places encroached upon, with reasonable certainty; and until notice of removal is served upon the land-holder he cannot be regarded as in fault, nor can he be called upon to remove anything not distinctly located by the notice; and, in cases of dispute as to existence and bounds

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HIGHWAYS—Continued.

of the highway, this summary remedy is forbidden, and the commissioner is specifically directed to proceed at law by trespass.

e—Under the highway law no township officer except the commissioner of highways has any right to meddle with highway matters. His duty is, when he thinks a road is encroached on, to satisfy himself in some responsible way, which will bear the test of a lawsuit, *where* the highway lines are, and *how* they are encroached upon. Until he complains, no one else can do so, and no one else can change his order; and when his order is disregarded, his remedy is specifically prescribed, and no remedy in any other form is as well calculated to reach the desired result. *Id.* (2).

See COSTS (1); TAXES (3).

HOMESTEAD.

A contract for the sale of land, a part of which is occupied as a homestead, which contract is not signed by the wife, is only void as to the homestead, and an action lies for damages against the husband for refusing to convey the remainder of the land pursuant to the contract. 456 (7).

See DOWER (*a*); EQUITY.

HUSBAND AND WIFE.

1. In case of a joint lease to husband and wife, which does not come within the rules applicable to tenants in common, the husband's common-law rights as head of the household are important. 18 (*b*).

2. A wife cannot stipulate for giving any one a home in her husband's household. *Id.* (*c*).

See DELIVERY (4); HOMESTEAD.

IMPOUNDED ANIMALS—See NOTICE; REPLEVIN (2).

INFANTS.

Infants sued are under the law to be defended by guardian *ad litem*, and not by general guardian, nor has a general guardian the right to bind the infants by a consent decree. 110 (8).

INSURANCE—See FIRE INSURANCE.

INTEREST—See JURY (2).

JOINDER OF PARTIES—See PARTIES.

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JUDGMENT CREDITOR'S BILL

1. An answer to a judgment creditor's bill, used in opposition to a motion for the appointment of a receiver before the time for replying has expired, can only be treated as an affidavit. 10 (1).
2. It is proper to permit affidavits to be read on the hearing of a motion for a receiver in a judgment creditor's suit, to meet matters set up in avoidance in defendant's answer. *Id.* (2).
3. A general assertion in an answer to a judgment creditor's bill that the defendant has property liable to execution, and which might have been levied upon, is insufficient. He must state what and where the property was that the sheriff ought to, but did not, seize. *Id.* (3).
4. On the hearing of a motion for a receiver in a judgment creditor's suit upon bill and answer, before the time for replying has expired, the return by the sheriff of the execution unsatisfied is conclusive upon the defendant. 11 (4).
5. Under How. Stat. § 6612, the circuit court of the county in which the assignee of a judgment resides has jurisdiction of a creditor's bill to enforce said judgment. *Id.* (5).
6. It is not necessary for the assignee of a judgment to cause an execution to be issued and returned *nulla bona*, after becoming such assignee, before he can file a creditor's bill, where an execution has been so issued and returned prior to such assignment. *Id.* (6).
7. One of two judgment debtors against whom an execution has been returned unsatisfied as shown by a creditor's bill filed against the remaining debtor, who asserts in his answer that his co-debtor is insolvent, is not a necessary party to said suit; there being no dispute over the amount due to the complainant. *Id.* (7).
8. In this case it is held that the judge had jurisdiction to appoint a receiver; that he exercised his discretion properly; that the record affords no excuse for appealing; and that, under the circumstances, the order was not appealable. *Id.* (8).
9. Complainant filed a creditors' bill to subject a mortgage, originally executed to defendant Levi Conkwright to secure part of the purchase price agreed to be paid on the sale of 80 acres of land owned by him, and which, after delivery, was changed so as to make defendant Calista Conkwright the mortgagee, to the satisfaction of a judgment in favor of

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JUDGMENT CREDITOR'S BILL—Continued.

complainant and against Levi Conkwright; and, on a review of the testimony, the Court find that such change was made with intent to defraud complainant, and affirm the decree below granting the relief prayed for. 58 (1).

10. The voluntary assignment of a mortgage to the mortgagee's wife, by substituting her name as mortgagee after the instrument has become operative by delivery, and without consideration, will not prevent the subjection of the mortgage to the equitable remedies of a judgment creditor of the husband, in order to apply it in satisfaction of the judgment. *Id.* (2).

11. Where land, paid for by a wife, is by mistake conveyed to the husband, and the wife sells the land as her own, and informs the purchaser that she is the owner, and both understand that a purchase price mortgage shall be drawn in her favor, which, by a mistake of the scrivener, is drawn in favor of the husband, the correction of said mistake, after the delivery of the mortgage, by the consent of the mortgagor, by substituting the name of the wife as mortgagee, cannot be claimed to be in fraud of the husband's creditors, and need not be supported by a new consideration. *Id.* (3).

JURISDICTION—See HIGHWAYS (3).

JURY.

1. Refusal to allow a peremptory challenge after the jury is sworn in is not error. 124 (1).

2. Where the foreman of a jury annonnced that they found for the plaintiff in a given sum, and, at the request of plaintiff's counsel, the court inquired if it included interest, and one of the jurors replied that it did and stated the amount of the principal, it is not error for the court, if satisfied that interest was not included, to send the jury out again, to ascertain such interest. 195 (2).

3. It is going too far to ask for the reversal of a judgment, on error, on the idea that the jury were bound to disbelieve sworn testimony because other testimony was more probable. 655 (2).

4. Where a verdict is supported by testimony which was legally receivable, and which the jury had a right to believe and did believe, and which the trial court fairly submitted to them,

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JURY—Continued.

it is no part of the duty of the appellate court to speculate whether the jury acted judiciously in determining which witnesses presented matters truly and which otherwise. In such a case they act within their legitimate powers, and, in legal presumption, decide correctly. *Id.* (3).

5. A verdict considerably lower than the outside range of the testimony would have warranted is not excessive. *Id.* (4).

See DAMAGES (3); QUESTIONS TO JURY.

JUSTICES OF THE PEACE—See HIGHWAYS (3).

KNOWLEDGE OF THE LAW—See FRAUDULENT REPRESENTATIONS (2).

LANDLORD AND TENANT.

The concealment by a landlord from a tenant of the polluted condition of the water in a well belonging to the leased premises, after his discovery of the cause, which he failed to remove, and which existed at the time of the leasing, will subject him to damages for all of the injuries naturally following from the use of the water, and the tenant, on discovering the facts, is justified in vacating the premises and terminating the tenancy, if the cause of such pollution cannot be removed; its presence amounting to an eviction, relieving the tenant from the payment of rent after such removal.

So *held*, where on complaint by the tenant of the condition of the water an examination was made by the landlord, who discovered the carcass of a dead dog in the well, which he did not remove, but advised the tenant's wife not to use the water for cooking or drinking purposes, but that it was all right for scrubbing, etc., and such use was made of the water as resulted in sickness in the tenant's family, who removed from the premises on discovering the real facts, and, in a suit to recover rent, the tenant sought to recoup the expenses of such sickness, including physician's bills, etc., as damages; and his right to do so is affirmed, and $50 damages awarded against the landlord for a vexatious appeal, the tenant having recovered in the justice's court, and on appeal to the circuit. 135.

LABOR CLAIMS—See PUBLIC BUILDINGS.

LACHES—See MORTGAGE (4).

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LEASE.

In this case a deed from a father to his son, and a life-lease back to the father, are construed together, and the lease is held not to give exclusive possession to the father, after the son's death, with right to eject the son's widow, etc. 415 (2).

See HUSBAND AND WIFE.

LIBL AND SLANDER.

1. A partnership is liable for slanderous statements made by one partner, the purpose of which is to aid the partnership business by preventing another party from making sales of an article which the partnership is at the time selling. 1 (1).
2. Words spoken or written injurious to a person in his business, and false and malicious, are actionable *per se*, and special damages need not be proved. *Id.* (2).
3. In this case it is held that the facts shown, and offered to be shown, by the plaintiff, raised issues which should have gone to the jury, and that under the evidence given and offered, which upon this record must be taken as true, the plaintiff was entitled to have the alleged libelous article placed before the jury; and that, under proper instructions, it was a question of fact for their consideration whether its publication was within defendants' knowledge, or whether they were responsible for it. *Id.* (4).
4. While it is true that two or more persons cannot as a general rule be held jointly liable for a verbal slander, yet, under circumstances where all are jointly concerned and interested, and participate in the general purpose, such concert and co-operation may be shown, although the false and malicious statements may have been made by one alone. 472 (1).
5. In this case Mr. Justice MORSE filed an opinion, favoring a reversal for the failure of the trial court to instruct the jury, as requested by the defendant, that if the plaintiff, at and before the publication of the alleged libel, was generally known as "John D. Finnegan," and not as merely "John Finnegan," and that the initial letter had been adopted by him to distinguish him from persons known by the latter name, the article complained of will not be presumed to have had reference to the plaintiff, and, as there is no evidence in the case that plaintiff is the person referred to in said article, their verdict must be for the defendant. 659 (1).

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LIBEL AND SLANDER—Continued.

6. CHAMPLIN and LONG, JJ., concurred in the reversal of the judgment. 660 (2).

7. SHERWOOD, C. J., and CAMPBELL, J., favored the affirmance of the judgment. *Id.* (3).

See STATUTE OF LIMITATIONS (2).

LIEN FOR SAW-BILL.

A log-owner contracted with a mill-owner for sawing a quantity of logs, and sold 700,000 feet of the lumber, which was paid for, and piled by itself on the dock, and marked by the mill-owner with the initial letters of the vendee's name, who shipped 600,000 feet, and, at the close of the season's sawing, the vendor settled for the balance of the saw-bill by his note, which was accepted by the mill-owner, who is held by these acts to have waived any lien he had upon said lumber; and it is further held that he had no lien upon the lumber so sold for the entire season's sawing. 81.

LIFE EXPECTANCY—See MORTALITY TABLES.

LIFE-LEASE—See EQUITY.

LIFE SUPPORT OF PARENT—See CONTRACT (1).

MANDAMUS.

Relator applied for *mandamus* to compel respondent to place on the assessment roll so much of private claim 306 as lies south of the town line between China and St. Clair townships and west of Pine river and of the corporate limits of the city of St. Clair. The reason given for relator's interference is that there was formerly a bridge across Pine river on the township road between China and St. Clair, on the west side of Pine river, which communicated with the city of St. Clair, lying on the east side, which is now destroyed, and cannot be rebuilt, because of the dispute as to the township in which the west end of it would lie; that respondent claims the land belongs to East China, whereas the relator claims it is in China; that relator uses the road, and he and his neighbors need the bridge to get conveniently to the city. It does not appear whether the bridge had a draw or not. The Court hold that relator's purpose cannot be reached by *mandamus* proceedings, and suggest that the controversy can be amicably determined. 606 (2).

See APPEAL.

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MASTER AND SERVANT.

1. Where a servant, whose duty it is at any time during working hours when upon the master's premises to perform the duties incident to his employment, starts to leave the premises on his private business, and is injured by the alleged negligence of the master, while upon the premises, and during working hours, he is at the time in the employment of the master. 272 (5).
2. The duty of inspection, when required by the circumstances of the case, cannot be delegated by the master in such manner as to avoid responsibility. 492 (1).
3. The following propositions are summarized from the opinion of Mr. Justice CHAMPLIN:

a—This Court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negligence of a fellow-servant while engaged in a common employment.

b—Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined *who* are fellow-servants, in such sense as to shield the master for the negligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence.

c—The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego* (another self), and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself.

d—It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his own employés through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons.

e—Whenever the business conducted by a person selected by the master is such that he is invested with full control (subject to no one's supervision except the master's) over the action of the employés engaged in carrying on a particular

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MASTER AND SERVANT—Continued.

branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employés to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls. 514, 515 (8).

See FELLOW-SERVANTS.

MATERIAL CLAIMS—See PUBLIC BUILDINGS.

MECHANICS' LIEN LAW.

In this case, the judgment, so far as it establishes a personal liability against the defendant, is affirmed, but is held void so far as it gives plaintiff a lien under the mechanics' lien law of 1887, which was held unconstitutional in *John Spry Lumber Company v. Loan & Trust Co.*, 77 Mich. 199. 334.

MICHIGAN CASES CONSTRUED.

This case was not reversed on the former hearing (65 Mich. 10) on the ground that evidence was received concerning the condition of the yard in which the accident happened, and the use of it as a place of pastime by children, nor was it held that the error of the court in receiving such testimony was not cured by its being afterwards withdrawn from the consideration of the jury. 899 (1).

MISDEMEANOR—See ARREST.

MORTALITY TABLES.

The mortality tables contained in How. Stat. § 4245, show the probable life expectancy of a healthy person, whose age is given, but are not conclusive evidence; and when offered in connection with proof of the physical condition of the deceased at the time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from *all* of the testimony before them such probable duration of life had the deceased not died as a result of the injury complained of. 514 (4).

MORTGAGE.

1. Where judgment creditors file a bill in aid of execution, and join as defendants *prior* attaching creditors, who have levied upon the land to satisfy the judgment rendered in the attachment suit, and who also hold a mortgage upon the

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MORTGAGE—Continued.

property having priority over complainants' lien, and who in their answer claim the benefit of a cross-bill, and pray for the foreclosure of their mortgage, a statutory foreclosure of which was enjoined in said suit at the instance of complainants, the court on dismissing the bill should decree such foreclosure. 28 (1).

2. A mortgage executed by a debtor to secure his creditor for his debt, and also to secure a debt due another creditor, which the mortgagee agrees to pay, is not in fraud of other creditors. *Id.* (2).

3. We have enjoined foreclosure sales by advertisement upon tender of the amount due, *not* including any attorney fee; but we have never held such a foreclosure void because of including the attorney fee in the sum for which the land was sold. 171 (1).

4. In this case a delay of fourteen years in taking steps to redeem from a statutory foreclosure, which is claimed to be void by reason of including in the sum the land sold for an attorney fee and some unpaid taxes, is held to amount to gross laches, defeating complainant's right to redeem. 172 (2).

5. A mortgagor assigned to the mortgagee, as *additional* security for the payment of the mortgage debt, a mortgage in process of foreclosure, which was to be completed by the assignee, in whom the title to the mortgaged premises was to be perfected, and who was to hold said premises as additional security for said debt, and for the actual costs of such foreclosure and sale, and for any taxes or assessments levied or assessed upon the mortgaged premises *after* the assignment, all of which the assignor agreed to pay. It was further provided that in case of his failure to make such payment the assignee might purchase or pay the same, and be repaid therefor on the sale of said assigned mortgage or of the premises covered thereby. Provision was made for the re-assignment of the mortgage, or the conveyance to the assignor of the title secured on such foreclosure sale, on payment of the original mortgage debt, and any costs, taxes, or assessments which the assignee might have paid by virtue of the agreement; and it was expressly provided that the assignee should not be liable for any loss or damage caused by the sale of said premises for the non-payment of taxes or assessments.

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MORTGAGE—Continued.

The assignee completed the foreclosure, and bid in the mortgaged premises, and for the purpose, as claimed, of protecting his mortgage interest purchased outstanding tax titles, *not* covered by the agreement, and paid taxes charged against the mortgaged premises at time of the assignment. The original mortgage debt was satisfied by the foreclosure of the original mortgage, and in a suit brought by the assignee to foreclose the agreement contained in said assignment for the foreclosure costs, and for taxes assessed *after* the making of said agreement, which he had paid, he also sought to recover the money paid for said outstanding tax titles and taxes; and it is held that before such a liability on the part of the assignor could exist, or a lien be created, a special agreement would have to be made, which contract a court of equity cannot create for the parties. 255.

6. In this case complainants,—the widow and minor children of defendants' deceased son,—are held entitled to a lien upon a certain store-building and lot, to secure the payment of $2,700 furnished by the son to his father towards erecting said building; and it is decreed that in default of the payment of said sum, and interest, in 18 months after the death of the defendants, the property may be advertised and sold to satisfy said lien, in the same manner as upon a foreclosure of a mortgage in chancery. 290.

7. Where a mortgagee at the time the mortgage was given owed certain open accounts which he subsequently requested the mortgagor to *pay*, and agreed to allow the amounts so paid on the mortgage, and the accounts were paid by the mortgagor, who took assignments of the same in his own name, which assigned accounts he tendered to the assignee of the mortgage,—who took it subject to all existing equities,—and offered to pay him any balance due for principal and interest on the mortgage, which was refused, the amount of the accounts should be applied as payment *pro tanto* on the mortgage, and although the tender did not comply with all of the requirements necessary to discharge the mortgage, yet as it showed a willingness on the part of the mortgagee to make such payment as would effect such discharge at any time when it would be received without suit, the mortgagor should not be subjected to the payment of costs in a foreclosure suit afterwards brought by the assignee in defiance of such payments and tender. 298 (1).

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MORTGAGE—Continued.

8. In such a case, the fact that the mortgagor is not personally liable for the debt is unimportant, he being the owner of the land, which he must lose or pay the decree, and the effect being the same as if he had given his note and secured it by mortgage. *Id.* (2).

9. Where a mortgage has been delivered to become operative, a separate delivery is not necessary to every one named in it, but delivery to one is delivery to all, unless there is some reason to the contrary.. 627 (1).

10. Under such a mortgage, which contains no personal covenant, and does not purport to secure the payment of the sums specified according to existing terms and conditions, but which created in every case a *new* principal, none of the mortgagees can claim to be secured for any greater sum than the one named in the mortgage. 628 (2).

11. There is no practice which authorizes parties to come in and prove their cases, except in the regular course of the cause. A practice has sometimes been followed—how regularly we do not now inquire—of advertising, under receiverships and other cases of administration of funds, for persons to come in and prove their claims. But in the present case the mortgage is for definite parties, and the time for them to come in was before hearing, so that any inquiry needed might be made in due time, by the ordinary examination and cross-examination of witnesses, and the proved debts should have been decreed to be paid at once out of the proceeds of sale of the mortgaged premises. *Id.* (3).

12. The absence of a personal liability clause in a foreclosure decree is no ground for appeal, unless the decree goes further, and declares that no such liability should exist. *Id.* (4).

13. The jurisdiction to decree the payment of a deficiency on a foreclosure sale is statutory, and limited to cases where the mortgage is given to secure a written obligation, which must itself be capable of legal enforcement, and also not outlawed (*Ins. Co. v. Brown*, 11 Mich. 265); and it is to be exercised, and the trial of liability had, on a new hearing, after the deficiency is reported. Any decree for payment made in advance of sale is, at best, no more than declaratory, and can fix no rights. *Id.* (5).

14. How. Stat. § 6702, providing for a decree for the payment by a mortgagor of a deficiency on a foreclosure sale, covers

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MORTGAGE—Continued.

no case where a single decree cannot be made in favor of the complainant. It does not contemplate the case where there are several complainants, who hold the mortgage *jointly*, but have no general right to any of the debts secured. *Id.* (6).

15. A statute which transfers to a court of equity jurisdiction to give judgments belonging to the common law cannot be enlarged by construction. 629 (7).

See CHATTEL MORTGAGE; DELIVERY; FORCIBLE ENTRY AND DETAINER; JUDGMENT CREDITOR'S BILL (9–11).

MUNICIPAL CORPORATIONS.

1. A proviso to a section in a city charter requiring that all ordinances shall be published for three successive days and take effect in ten days after their enactment, which empowers the common council to prescribe a different period, and provides that no ordinance shall take effect before one publication thereof, means that no ordinance can be enforced, and violation thereof punished, until the public have been informed of its enactment by at least one publication; the matter of publication being only essential before enforcement. 98 (1).

2. Section 11 of chapter 66 of the Revised Ordinances of 1884, of the city of Detroit, as amended April 5, 1889, does not prohibit farmers and gardeners from selling their produce through the city, or from casually stopping their wagons for that purpose, but is intended to prevent such wagons standing in the streets for the purpose of selling such produce, and with no intention of moving until it is sold, and is a reasonable restriction upon all classes, and within the power of the council to adopt, under a section of the charter giving them power "to prohibit and prevent incumbering or obstructing of streets," etc., "with vehicles, animals," etc. 99 (2).

3. Section 17 of the charter of Bay City requires that the lots and premises specially benefited by the construction of a sewer or sidewalk shall be assessed according to the benefits derived from such improvement, while section 50 of the charter requires that the comptroller shall set down in the tax roll the description of all the lands and premises he deems to be specially benefited by the proposed work, the amount assessed against each description, which shall include the contract

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MUNICIPAL CORPORATIONS—Continued.

price of construction and the amount, as estimated by the board of public works, for surveying, superintending, construction, and advertising. And it is held that if the assessing officer should, under the two sections, assess the whole cost of the work as commanded by section 50, and yet show that such assessment did not exceed the whole amount of benefits derived by the property assessed from the improvement, there would be no conflict between the two sections. 211 (1).

4. Under a charter providing that the lots and premises specially benefited thereby shall be assessed according to the benefits derived from the construction of any sewer or sidewalk, the roll must show expressly that the assessment was made on the basis fixed by the charter, and it should also appear of record somewhere that the benefits to the whole property included in the taxing district will equal the whole cost of the proposed work. *Id.* (2).

See CONTRACT (2); HIGHWAYS (1); NOTICE.

NEGLIGENCE.

1. It is negligence to throw bales of hay from the loft of a barn, facing a public street, onto the sidewalk, without first looking into the street and onto the sidewalk, to see if any one is near by, and giving sufficient warning to prevent approach. 153 (1).

2. Where, in a suit to recover damages for injuries sustained by being hit by a bale of hay thrown from a barn loft onto a public sidewalk, there was no proof that the plaintiff saw other bales fall, or that she was where she could not well avoid seeing them, there can be no proper inference that she saw them, and the court is not called upon to instruct the jury that *if* plaintiff had seen other bales fall she should have been wary of the one causing the injury. 154 (2).

3. It is error to direct a verdict for the defendant in a negligence case on the ground of plaintiff's contributory negligence, when, in order to convict plaintiff of such negligence, it is necessary to *assume* that he must have heard what other unimpeached witnesses did not hear, or seen what they did not see. 205.

4. Where the icy condition of a walk upon which plaintiff fell

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NEGLIGENCE—Continued.

and sustained injuries, for which she sues, was not the result of neglect to remove naturally-accruing ice and snow, but was caused by the action of the defendant in throwing water on the place where it froze, the case is a proper one for the jury. 356 (1).

5. In this case, it is held that there is no variance at all between the case charged and the case made, which distinguishes it from *Wilkinson v. Spring Works*, 73 Mich. 405, where the declaration charged that a particular ailment was *produced* by the accident, and the Court held that the plaintiff was confined in his recovery to the scope of his allegations and proof. *Id.* (2).

6. In a suit by a boy for injuries received, when only five years old, by being thrown under the wheels of defendant's engine, while riding on the foot-board, in defendant's railroad-yard, instructions to the jury that, in order to find a verdict for the plaintiff, they must find by a preponderance of evidence,—

a—That the boy was on the foot-board, and was seen by the engineer, who, after seeing him there, started the engine without ascertaining whether the boy had got off;—

b—That the engineer was guilty of gross negligence;—

c—That the boy, by reason of his insufficient intelligence, was unable to comprehend the danger, and was not guilty of contributory negligence,—

Are not misleading or inconsistent, and sufficiently define the gross negligence referred to. 399 (4).

7. Where, by the breaking of a bridge which a township had failed to keep in repair, the water and steam from a boiler attached to an engine which the owner is hauling over the bridge escapes, and injures his horses, the breaking of the bridge is the proximate cause of the escape of the steam and water, and if the township is otherwise liable it is liable for such damage. 485 (1).

8. Where, in a suit for damages sustained by reason of the breaking of a bridge-stringer, the jury find that to all outward appearance the stringer was sound, but was rotten internally, in the absence of personal knowledge on the part of the proper officers of the hidden defect, the question for the jury is whether said officers used due diligence in discovering such defect, and neglected to do that which com-

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NEGLIGENCE—Continued.

mon prudence and caution required them to do to ascertain the true condition of the stringer. 486 (2).

9. In charging a jury in a negligence case the court should distinguish between the negligence which *caused* the injury and that which *contributed* to it. *Id.* (3).

10. Contributory negligence to defeat a right of action must be that of the party injured. 513 (2).

11. If a defendant (in a negligence case), by his own act, has thrown the plaintiff off his guard, and given him reason to believe that vigilance was not needed, its lack on the part of the plaintiff is no bar to his claim. 687 (1).

See DAMAGES (1, 4, 5); FELLOW-SERVANTS; MASTER AND SERVANT.

NEW TRIAL—See PRACTICE IN SUPREME COURT (2).

NOTICE.

Under a village ordinance requiring the pound-master to sell at public auction animals which have been impounded for a period of eight days, and are unclaimed, and to give six days' notice of such sale, a sale cannot be made until the eight days have expired, and not then until the notice provided for is given, which notice is a part of the proceedings to sale, and cannot be given until the expiration of the eight days of impounding, the object being to give the owner fourteen days in which to redeem his property before its sale. 648 (1).

See BILLS AND NOTES (6).

ORDINANCE—See NOTICE.

PARENT AND CHILD—See CONTRACT (1); EQUITY; GUARDIAN AND WARD.

PARTIES.

When an obligation is joint as well as several, all must be proceeded against jointly, or each severally, subject to certain exceptions, as where one is an infant, or has been discharged in bankruptcy. 313 (2).

See REPLEVIN (1).

PARTITION—See DOWER.

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PARTNERSHIP.

1. A surviving partner becomes a trustee for the representatives of the deceased partner, for the firm creditors, and for himself, and is held strictly as such, and his conduct in discharging his trust is carefully looked after by courts of equity. It is his duty as trustee to keep correct and accurate books of account, which shall show what property he holds in trust. and what disposition he makes of the same. 249 (1).
2. A surviving partner who obtains the full control of affairs by investing himself with the administration of his deceased partner's estate, assumes new duties and liabilities as a trustee, which facts call for closer scrutiny, and for the application of that wholesome rule that where he has neglected to account for the assets he may be charged with their highest value which the proofs show, and for all rents and profits which he might by judicious management have received without neglect or default; or he may be charged with interest upon the deceased partner's capital. *Id.* (2).

See LIBEL AND SLANDER (1).

PAYMENT—See CHATTEL MORTGAGE (2).

PECUNIARY INJURY—See DAMAGES (4).

PERPETUITY—See DAMAGES (5).

PERSONAL LIBERTY—See ARREST.

PLEADING.

1. Money paid without consideration may be recovered under a declaration on the common counts for money had and received. 126 (1).
2. A declaration containing four counts, namely:

a—For obstructing a navigable river with saw-logs so that plaintiff could not make use of it in floating his logs and timber, and in not making use of any means for the removal of such obstructions;—

b—For a like obstruction of the river at another time and place, so as to hinder and delay the plaintiff's drive unreasonably, by which he lost the sale of his logs at an agreed price, and was obliged to sell the same at a greatly reduced price;—

c—For breaking plaintiff's booms and chains, and setting his logs adrift, thus subjecting him to large expense in securing them from loss and destruction;—

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PLEADING—Continued.

d—For breaking said booms and chains at another time and place, by means of which plaintiff's logs went adrift and became mixed with other logs, putting him to large expense in getting them together again, and sorting them from among other logs,—

Is not objectionable for a misjoinder of causes of action. 294 (1).

3. Giving a statutory right of action different in form from that at the common law for the same grievance, does not abrogate the right to proceed at common law, unless the new remedy is declared to be exclusive. *Id.* (2).
4. How. Stat. § 7759, removes all objection to the joinder of a count in trespass with one in case, in the same declaration, and should be liberally construed by the courts. *Id.* (3).
5. A declaration which states a cause of action and is not demurred to is sufficient after verdict. 514 (7).
6. Where a defendant does not elect to stand upon his demurrer, when overruled, but pleads issuably, and goes to trial on the merits, an assignment of error on the overruling of the demurrer will not be considered. 587 (1).

See HIGHWAYS (5).

POSSESSION—See CHATTEL MORTGAGE (2).

POSSESSION OF LAND—See FORCIBLE ENTRY AND DETAINER.

PRACTICE IN CIRCUIT COURT.

A plaintiff has the right, at least, to *attempt* to try his case upon his own theory, and to take such steps as are necessary to afford a remedy in case he is not permitted to do so, and the fact that his counsel knows that the trial court will not permit certain questions to be answered cannot affect his right to *ask* them, or his good faith in so doing. 399 (3).

See DIRECTING VERDICT.

PRACTICE IN SUPREME COURT.

1. The appellate court does not concern itself with errors claimed to have been committed against the non-appealing party. 399 (2).
2. A motion for a new trial, with the accompanying affidavits, forms no part of the record, and are not brought up on writ of error (*Final v. Backus*, 18 Mich. 233); nor can error be

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PRACTICE IN SUPREME COURT—Continued.
assigned in a civil case upon a refusal to grant the motion. 400 (6).
8. The omission of the dates of filing papers from the record is censured as creating trouble in the examination of causes. 629 (8).

PRINCIPAL AND AGENT.
1. The only question in this case is the authority of the brother of plaintiff to release defendant from the payment of $5 of the price agreed to be paid for a sewing-machine purchased of the plaintiff, the title to which was retained until the purchase price was fully paid, and the Court is unable to say that there was no evidence proper for the jury to consider as establishing such authority. 48.
2. In this case it is held that the authority of defendant's local agent to make the contract sued upon is sufficiently shown by the evidence, which question should have been submitted to the jury, as also the question of defendant's ratification of said contract. 217.
3. Where after the purchase from a brick company of the brick upon its yard, burned and unburned, the vendee allows the president of the corporation to manage the yard and sell brick as his agent, and collect the proceeds of such sales, he becomes such an agent that his contracts are binding upon the vendee if made in the due course of the business; and payments made to such agent by a purchaser of brick who had no knowledge of the change of possession under said first-named purchase are binding upon the principal. 595 (1).
4. Where, in such a case, the agent at one time agreed to receive wood of a purchaser to apply on the amount due for brick, and directed him to deliver the wood to a specified third party, but before such delivery countermanded the direction, and ordered the purchaser not to make such delivery, which he did notwithstanding such countermand, this cannot be considered as a delivery to the agent, and it is immaterial that the agent did not forbid the third person from taking the wood. *Id.* (2).

PRIVILEGED COMMUNICATION—See EVIDENCE (14).

PROXIMATE CAUSE—See NEGLIGENCE (7).

PUBLICATION—See NOTICE.

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PUBLIC BUILDINGS.

1. Officers who contract for the erection of public buildings, and fail to require security from the contractor for the payment of labor and material claims, as required by Act No. 94, Laws of 1883, are liable in damages, at the suit of laborers and material-men injured thereby. 260 (1).

2. The liability of officers to pay for labor and materials furnished for the erection of public buildings, by reason of their failure to require security from the contractor for such payment as provided by Act No. 94, Laws of 1883, is more in the nature of a suretyship than a tort, when the officers have acted in good faith, and they are not bound to wait until suit is brought against them before making such payment. 261 (2).

3. Where a contractor for the erection of a public building was not required to give security for the payment of labor and material claims,—both parties being ignorant of the law requiring it,—and on being thereafter requested to execute the required bond refused to do so, and made default in the performance of the contract, which was completed at the expense of the other party, in a suit by the contractor for the balance claimed to be due under the contract, the defendant may deduct from said claim the amount paid for material furnished, and labor performed, for the plaintiff, and also the amount due from him for material and labor, and for the payment of which demands have been made upon the defendant's officers, who, by reason of their failure to require said bond, are personally liable for such claims. *Id.* (3).

PUBLIC POLICY.

Where the owner places lands in the hands of a broker for sale, at a fixed price, who agrees with a second broker, without the knowledge of the owner, that if he will find a purchaser at a specified *increased* price they will divide the profits, and the second broker agrees with a third broker that he may find a purchaser at a still further fixed increased price, and that they shall divide equally whatever he may secure above said last named price, such last contract is not void on the ground of public policy because the land-owner and first broker are ignorant of it. 318 (4).

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PUBLIC RECORDS.

1. Sales-books kept by the receiver of taxes, containing a statement of the sale of delinquent tax lands, and by him turned over to the city treasurer, who minutes therein redemptions or sales of city bids, are public records within the meaning of Act No. 205, Laws of 1889, providing for the inspection of records and files in public offices. 363 (1).

2. A city can have no private books, not even of accounts, not open to the inspection of its citizens. Its doings, and the doings of its officers, and the records and files in their offices, must be open to the public; nor can fees be charged for such inspection to those having the right to examine and inspect such files and records. *Id.* (2).

3. The Legislature intended to assert, by Act No. 205, Laws of 1889, the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. 364 (3).

QUESTIONS TO JURY.

Requests for findings by the jury which do not call for their conclusions on any fact in issue, but only on the truthfulness or accuracy of certain named witnesses on certain facts which were matters of evidence merely, however significant they may have seemed, are very objectionable. 654 (1).

RAILROAD COMPANIES.

A deed of right of way contained the following defeasance clause:

"If the said railway company, its successors or assigns, should fail to complete said railway through said premises, and to put the same in operation, within three years from the date hereof, or if, after such railway is completed and put in operation, it should cease to be used and operated as a railroad, then, in either event, this release shall cease to be operative, and the right of way granted thereunder shall terminate."

The railway company ceased to use the right of way except for the storage of cars, and it is held that thereupon the deed had no further force or effect. 615.

See DAMAGES (4); EVIDENCE (16); FELLOW-SERVANTS (2).

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RAILS.

Rails placed in a line fence, but upon the land of the adjoining owner, with no intention of leaving them there permanently, are personal property; and in a trespass suit by the grantee of such owner for the removal of such rails, the title to land is not in question, and a plea of the general issue is sufficient. 480.

REAL-ESTATE BROKER.

A broker who merely brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other. 318 (3).

See PUBLIC POLICY.

REDELIVERY OF MORTGAGED PROPERTY—See CHATTEL MORTGAGE (2).

RECORDS—See PUBLIC RECORDS.

REPLEVIN.

1. In this case an assignee under an assignment for the benefit of creditors, after having taken possession of the assigned stock of goods, and while engaged in inventorying and appraising the same, assumed to surrender the actual possession to the holder of a chattel mortgage on the goods made the day prior to the assignment, and by agreement between them the inventory was to be completed, and, after a portion of the goods had been replevied from him and the mortgagee by creditors, the assignee filed said inventory and appraisal, which included the goods so replevied, and gave the statutory bond for double the appraised value of the assigned property; and the assignee is held to have been properly made a party defendant in the replevin suit, which was discontinued as to the mortgagee, and prosecuted to judgment against the assignee as sole defendant. 602.
2. Chapter 289, How. Stat. (How. Stat. §§ 8372–8374), providing for a special action of replevin in the case of impounded animals, is confined to cases arising under its provisions. 648 (2).

See CHATTEL MORTGAGE (2).

RESCINDING CONTRACT—See EXCHANGE OF LAND.

REGISTRATION—See CONSTITUTIONAL LAW (2); ELECTIONS (1).

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RIGHT OF WAY—See RAILROAD COMPANIES.

SALARY—See SHERIFF'S FEES (1).

SALE.

1. The burden of proof is upon the vendee to make it appear that the sale was made in good faith and without any intent to defraud the creditors of the vendor, where such sale is not followed by an actual and continued change of possession, and a refusal to so instruct the jury is error. 221 (1).
2. In replevin by a vendee to recover a stock of goods seized at the suit of the vendor's creditors, the plaintiff relied upon his bill of sale as evidence of his title, the consideration for which he claimed was two chattel mortgages held by him on the property. The creditors claimed that one of the mortgages was given without any valuable consideration, and that the other was increased in amount, all with intent to defraud them, and with the knowledge of the vendee; and it is held a question for the jury, and, if found in favor of the creditors, the fraud tainted the whole transaction, and prevented a recovery by the plaintiff. 222 (2).
3. It is error to instruct the jury, in a suit by a vendee to recover the value of goods from the attaching creditors of his vendor, that the plaintiff had made out a *prima facie* case by proving the sale to him of the goods, other facts being shown by plaintiff's testimony which might also have weight with the jury in determining the *bona fides* of the purchase. 337 (4).

SAW-BILL—See LIEN FOR SAW-BILL.

SCHOOL EXAMINER—See ELECTIONS (7).

SERVANTS—See FELLOW-SERVANTS.

SERVICE OF DECLARATION.

1. A suit commenced by declaration, under How. Stat. § 7291, cannot be considered as *duly commenced* until a copy of the declaration with notice of the rule to plead is personally served upon the defendant. 650 (1).
2. The affidavit of a private person, showing personal service of a declaration as commencement of suit, is open to contradiction by the defendant, who may show that no such service was made. *Id.* (2).

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SET-OFF—See CONTRACT (4).

SETTLEMENT.

The law approves of settlements and compromises of disputed claims, and, when deliberately made, the parties are bound by them, and the law will not sanction any interference with them, without the consent of the parties, except upon the ground of fraud or mistake. 342 (4).

SHERIFFS AND EX-SHERIFFS.

1. It is the duty of an ex-sheriff who has attached property in his custody, after an execution has been issued in the suit, to expose such property to the sheriff, when requested by him, in order that it may be taken on execution and sold to satisfy the same. 176 (1).
2. If an ex-sheriff has any valid charges as custodian, he should make out his bill of items, and present it to the clerk or other taxing officer for taxation, or, if they are *not* statutory fees, he should apply to the court for such allowance upon motion, and notice to the parties interested. He has no right arbitrarily to fix his own price, and retain the property until paid. 177 (2).
3. The right of an ex-sheriff to execute process until the service upon him of the clerk's certificate required by How. Stat. § 597, showing that his successor has qualified and given the security required by law, exists only as to such process as he has in his hands, and which he is required by How. Stat. § 569, to deliver to his successor upon service of such certificate. *Id.* (3).

See ATTACHMENT SUIT.

SHERIFFS' FEES.

1. The board of supervisors have no power to allow the sheriff an annual salary for services rendered the county, in lieu of all fees. 117 (1).
2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—It has been pointed out more than once by the Court that the sheriff must be confined to his statutory fees in all cases where they are fixed by statute. *Burk v. Webb*, 32 Mich. 173; *Clark v. Supervisors*, 38 Id. 658; *Peck v. Bank*, 51 Id. 353. And demanding and receiving more is a misdemeanor. How. Stat. § 9256.

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SHERIFFS' FEES—Continued.

b—Most of the sheriff's statutory fees relate to services in connection with the administration of civil and criminal justice, and the keeping and control of prisoners. There are the strongest reasons why such matters should not be left to the supervisors, but it is enough for the present purpose that they have not been so left.

c—The sheriff has it in his power to forward or hinder the course of criminal justice in many respects. It is essential to public safety that its administration be kept as far as possible free from any extraneous meddling or interference, and, if the supervisors or any other body can have a voice in the payment of the sheriff's charges, it is evident that his subservience to them is invited, if not compelled, and that they can have a good deal to do with the pursuit or exemption of criminals.

d—We have been compelled several times to compel the payment of justices' fees for criminal examinations that did not terminate as the supervisors desired, or which were prosecuted against their wishes.

e—If the principle is once admitted that any deviation can be had from the statutory allowances, the temptation is directly offered to the sheriff to make himself agreeable to the board on the one hand, and to shirk unprofitable duties on the other. 117, 118 (2).

SLANDER OF TITLE—See DAMAGES (2); EVIDENCE (18).

SPECIAL APPEAL—See APPEAL; QUESTIONS TO JURY.

SPECIFIC PERFORMANCE—See STATUTE OF FRAUDS (3).

STATUTE OF FRAUDS.

1. Evidence of a *verbal* option to sell real estate is competent where no question arises as to the enforcement of a conveyance under it,—which has been executed,—but is offered in a suit by the holder of the option to recover his share of the profits realized on a resale of the land by a third party. 318 (1).
2. The principle is well settled that, in order to satisfy the statute of frauds, the memorandum must contain the substantial terms of the contract, expressed with such certainty that they may be understood without resort to parol evidence. 623 (1).

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STATUTE OF FRAUDS—Continued.

3. The doctrine is well established that as between landlord and tenant, when the tenant is in possession at the date of the agreement to purchase, holding under the lease, continuance in possession is not an act of part performance to take the case out of the operation of the statute of frauds. *Id.* (2.)

4. Where the bill and answer in a suit for specific performance make an enforcible agreement for the purchase of land, which, without the admissions of the answer, is void under the statute of frauds, the equities of the complainant *thus* established cannot override the legal title of an intervening purchaser with notice of the void contract, which the defendant had elected to treat as void by conveying the land to said purchaser. *Id.* (3).

5. A verbal agreement to purchase land and convey it to a "pine-land broker," in payment of his commissions on a land sale, is void under the statute of frauds. 685.

STATUTE OF LIMITATIONS.

1. How. Stat. § 8724, which allows suit within two years after the discovery of a cause of action which has been "fraudulently concealed" from the knowledge of the party suing, was not meant to help parties who take no pains to see what is before their eyes. 132.

2. Whether How. Stat. § 8714, limiting actions for slanderous words to two years after the cause of action accrues, applies to an action for defamation of title by the execution of a deed and inserting therein a statement that the plaintiff had fraudulently obtained possession of the land, etc., query? But, if so, the continued claim of rights under the deed, which were settled adversely to defendants in a suit to remove the cloud thereby created less than two years prior to the commencement of suit, will save the action from the operation of the statute. 478 (4).

STATUTES CONSTRUED.

1. Under How. Stat. § 6612, the circuit court of the county in which the assignee of a judgment resides has jurisdiction of a creditor's bill to enforce said judgment. 11 (5).

2. Whatever the jury may learn of the lands sought to be condemned in a street-opening case under Act No. 124, Laws of 1883, by a view of the premises, may be used by them in

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STATUTES CONSTRUED—Continued.

determining the *weight* of conflicting testimony, but upon this view alone they cannot entirely disregard all other evidence, and fix and determine the compensation according to their own whims and caprices. 93 (1).

8. Upon an appeal in such a case, the statute provides that the case shall be treated as a chancery appeal, and that the appellate court may affirm, or for any substantial error reverse, the judgment, and may grant a new trial. *Id.* (2).

4. The question is not before us in the case whether either party may of right demand that the jury view the premises, but it is undoubtedly true that this right exists. *Id.* (3).

5. How. Stat. § 8295 (subd. 3), giving a summary remedy for securing the possession of premises sold by virtue of any mortgage or execution, applies, by its terms, only to redeemable foreclosures, and cannot cover chancery sales without enlarging it beyond its terms, and interfering with the legitimate powers of courts of equity. 115.

6. How. Stat. § 8724, which allows suit within two years after the discovery of a cause of action which has been "fraudulently concealed" from the knowledge of the party suing, was not meant to help parties who take no pains to see what is before their eyes. 132.

7. The statute making it the duty of cities to keep in reasonable repair all public streets open to public travel within their jurisdiction, and under their care and control, applies to defects in construction as well as to neglect to repair when the street is unsafe (*Carver v. Plank-road Co.*, 61 Mich. 590); and the safety required by the statute is secured to travelers as well by night as by day, and the dangers surrounding them in the darkness of the night are conditions that should be taken into consideration by the authorities whose duty it is to construct and keep in repair the roadway. 165 (1).

8. It is the roadway that the statute requires to be kept in a reasonably safe condition; and whether such way requires the use of the entire width of the street must depend entirely upon the necessities of travel in any given case, and of this the authorities of a township or city must take notice, at their peril. 166 (2).

9. The proviso in How. Stat. § 6815, that justices of the peace may have jurisdiction in actions for damages resulting from

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STATUTES CONSTRUED—Continued.
obstructions to highways, confers, at best, only a *concurrent* jurisdiction with the circuit court. 168 (1).

10. The right of an ex-sheriff to execute process until the service upon him of the clerk's certificate required by How. Stat. § 597, showing that his successor has qualified and given the security required by law, exists only as to such process as he has in his hands, and which he is required by How. Stat. § 599, to deliver to his successor upon service of such certificate. 177 (3).
11. Section 17 of Act No. 124, Laws of 1883, which provides that witnesses in a street-opening case shall be entitled to receive from the city the same fees as are provided by law for similar services in an ordinary action at law in the circuit courts of the State, applies to witnesses produced and sworn upon both sides of the issues pending, which are the public necessity, and the just compensation to be made to the owner for taking his property. 182 (1).
12. In such a case the court has the power to limit the number of witnesses which may be produced to prove a single point, and thus prevent abuse; and the fees of all witnesses whose attendance is procured in good faith should, on filing the affidavit required to tax witness fees in circuit courts, be taxed in favor of the party producing them. *Id.* (2).
13. Section 19 of Act No. 236, Laws of 1889, making it lawful for the judge in a street-opening case to order the payment by the city to any respondent of such a reasonable attorney fee as he may deem just, not exceeding $25, is not mandatory, but the matter of attorney fees is left discretionary with the judge. *Id.* (3).
14. How. Stat. § 7759, removes all objection to the joinder of a count in trespass with one in case, in the same declaration, and should be liberally construed by the courts. 294 (3).
15. Sales-books kept by the receiver of taxes, containing a statement of the sale of delinquent tax lands, and by him turned over to the city treasurer, who minutes therein redemptions or sales of city bids, are public records within the meaning of Act No. 205, Laws of 1889, providing for the inspection of records and files in public offices. 363 (1).
16. The Legislature intended to assert, by Act No. 205, Laws of 1889, the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in

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STATUTES CONSTRUED—Continued.

public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. 364 (3).

17. A town treasurer has no authority to bring suit for the collection of a personal tax under section 85 of Act No. 153, Laws of 1885, after his authority to enforce its collection under his original or supplemental warrant has expired, and such suit can only be resorted to when the person assessed has no property that can be reached under said warrants, or when he resides beyond the treasurer's jurisdiction. 435 (1).

18. The authority of the county treasurer to issue a supplemental warrant to a town treasurer for the collection of personal taxes under section 47 of Act No. 135, Laws of 1885, can only be exercised upon the town treasurer filing with the county treasurer the verified statement provided for by section 44 of said act, which must conform in all respects to the statutory requirements. *Id.* (2).

19. The first clause of section 4 of Act No. 264, Laws of 1887, which provides a remedy for the failure of townships to keep highways in repair, limits the right to bring suit under the first and second sections of the act, for personal injury and injury to property, to public highways which have been in use for *ten* years. 486 (4).

20. The duty imposed upon townships by section 3 of Act No. 264, Laws of 1887, to keep their highways in reasonable repair, etc., may be enforced by information or indictment where the highway has *not* been used as a public highway for ten years, but a personal action for damages will not lie in such cases. *Id.* (5)

21. The "fair and just damages" which the jury are authorized to assess against a railroad company, in a suit under How. Stat. § 3392, must have reference to the pecuniary injury resulting from the death which is the basis of the action. 530.

22. How. Stat. § 6702, providing for a decree for the payment by a mortgagor of a deficiency on a foreclosure sale, covers no case where a single decree cannot be made in favor of the complainant. It does not contemplate the case where there are several complainants, who hold the mortgage jointly, but have no general right to any of the debts secured. 628 (6).

23. Chapter 6 of Act No. 243, Laws of 1881 (How. Stat. §§ 1373–

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STATUTES CONSTRUED—Continued.

1376), furnishes not only an adequate remedy at law for the removal of encroachments upon township highways, but one devised for the very purpose, and made obligatory in terms, and leaves no occasion for resort to equity, unless under some possibly peculiar circumstances which cannot generally exist. 641 (1).

24. Chapter 289, How. Stat. (§§ 8372–8374), providing for a special action of replevin in the case of impounded animals, is confined to cases arising under its provisions. 648 (2).

STREET-OPENING CASE.

1. Whatever the jury may learn of the lands sought to be condemned in a street-opening case under Act No. 124, Laws of 1883, by a view of the premises, may be used by them in determining the weight of conflicting testimony, but upon this view alone they cannot entirely disregard all other evidence, and fix and determine the compensation according to their own whims and caprices. 93 (1).
2. Upon an appeal in a street-opening case, under Act No. 124, Laws of 1883, the statute provides that the case shall be treated as a chancery appeal, and that the appellate court may affirm, or for any substantial error reverse, the judgment, and may grant a new trial. *Id.* (2).
3. The question is not before us in the case whether either party in a street-opening case under Act No. 124, Laws of 1883, may of right demand that the jury view the premises, but it is undoubtedly true that this right exists. *Id.* (3).
4. Section 17 of Act No. 124, Laws of 1883, which provides that witnesses in a street-opening case shall be entitled to receive from the city the same fees as are provided by law for similar services in an ordinary action at law in the circuit courts of the State, applies to witnesses produced and sworn upon *both* sides of the issues pending, which are the public necessity, and the just compensation to be made to the owner for taking his property. 182 (1).
5. In such a case the court has the power to limit the number of witnesses which may be produced to prove a single point, and thus prevent abuse; and the fees of *all* witnesses whose attendance is procured in good faith should, on filing the affidavit required to tax witness fees in circuit courts, be taxed in favor of the party producing them. *Id.* (2).

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STREET-OPENING CASE—Continued.

6. Section 19 of Act No. 236, Laws of 1889, making it lawful for the judge in a street-opening case to order the payment by the city to any respondent of such a reasonable attorney fee as he may deem just, not exceeding $25, is not mandatory, but the matter of attorney fees is left discretionary with the judge. *Id.* (3).

SUBROGATION—See BILLS AND NOTES (5*b*).

SUPPORT OF PARENT—See CONTRACT (1)

TAXES.

1. The same rule must be applied to a sale by a town treasurer to satisfy a tax as to judicial sales. 77.
2. A sale of land to satisfy a tax, made up in part of an annual salary allowed a sheriff in lieu of all fees, is void. 117 (1).
3. A tax of $1,000 voted by the board of supervisors to be included in the county tax, to be distributed among and expended by the several supervisors for highway purposes, is illegal. 302 (1).
4. Where a bill is filed to restrain the sale of land for alleged illegal taxes, and it is conceded that $1,000 of the county tax is illegal, the circuit judge may deduct said illegal tax in making his decree, and allow the remainder of the tax to stand against the land. *Id.* (2).
5. Where no action appears to have been taken at the township meeting or by the town board, and none is properly certified to the supervisor by the township clerk, authorizing the assessment of a highway tax, such tax is illegal. *Id.* (3).
6. It is only on failure of the electors to vote taxes for township purposes at the annual meeting that the town board may vote the necessary sums for township expenses, and, as a condition precedent to such vote, such failure of the electors should be made to appear in some way to the township board, and the fact of such non-action should be evidenced by their record. *Id.* (4).
7. A town treasurer has no authority to bring suit for the collection of a personal tax under section 35 of Act No. 153, Laws of 1885, *after* his authority to enforce its collection under his original or supplemental warrant has expired, and such suit can only be resorted to when the person assessed has no prop-

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TAXES—Continued.

erty that can be reached under said warrants, or when he resides beyond the treasurer's jurisdiction. 435 (1).

8. The authority of the county treasurer to issue a supplemental warrant to a town treasurer for the collection of personal taxes, under section 47 of Act No. 153, Laws of 1885, can only be exercised upon the town treasurer filing with the county treasurer the verified statement provided for by section 44 of said act, which must conform in all respects to the statutory requirements. *Id.* (2).

See MANDAMUS; MORTGAGE (5); MUNICIPAL CORPORATIONS (3, 4); PUBLIC RECORDS (1).

TENDER—See CHATTEL MORTGAGE (2); MORTGAGE (7).

TEST OF FIRE-ALARM—See CONTRACT (2).

TITLE TO LAND.

A grantee may waive his right to the evidences of a good title, and rely upon his own knowledge, and the covenants of a warranty in his deed, but is not obliged to do so. 455 (3).

See DAMAGES (2); RAILS.

TOWNSHIP EXPENSES—See TAXES (6).

TRAIN DISPATCHER—See FELLOW-SERVANTS (2).

VERDICT.

Every presumption is in favor of the correctness of a verdict, and when the jury is polled is the time for a juror to speak, if he has anything to say against or in explanation of such verdict. 399 (5).

See DIRECTING VERDICT; JURY (2, 4, 5).

VERIFICATION—See EQUITY PRACTICE.

VEXATIOUS APPEAL—See LANDLORD AND TENANT.

VIEW OF PREMISES—See STREET-OPENING CASE (1, 3).

WAIVER—See ESTOPPEL.

WATERS AND WATER-RIGHTS—See DEED.

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WILL.

Whether, under a will devising to the testator's widow a life-estate in 160 acres of land, and bequeathing to each of two sons and three daughters a specified legacy to be paid out of the proceeds of the land after the mother's death, and all the rest and residue of the land to two other sons, in equal shares, to be given them after their mother's death, said legatees have any estate to levy upon prior to the mother's death, query? 186 (2).

WITNESS—See EVIDENCE (1, 7, 11, 12, 14); STREET-OPENING CASE (4, 5).

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